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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

C. P. POMEROY

REPORTER

VOLUME 164

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1913

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ORGANIZATION OF SUPREME COURT.

[Constitution, article VI, section 2.]

SEC. 2. The Supreme Court shall consist of a chief justice and six associate justices. The Court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions hereinafter contained in relation to the Court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the Court to be heard and decided by the Court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a case to be heard in Bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may convene the Court in Bank at any time, and shall be the presiding justice of the court when so convened. The concur-

• rence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the Court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices so assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the Court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

[S. F. No. 6020. Department Two.—September 27, 1912.]

In the Matter of the Estate of ELLEN M. COLTON,
Deceased.

ESTATES OF DECEASED PERSONS—PARTIAL DISTRIBUTION—CHOSE IN ACTION IN LITIGATION.—A chose in action belonging to the estate of a deceased person, which the executors were endeavoring to enforce by a pending action, should not be distributed on a petition for partial distribution in opposition to the wishes of certain of the parties in interest and of the executors.

ID.—CHOSES IN ACTION SHOULD NOT BE DISTRIBUTED.—As a statement of fact for the guidance of courts in probate, and not as a proposition of law, it is held that, generally speaking, claims in litigation should not be distributed unless with the full assent of all parties interested and under circumstances where it is apparent to the court that no embarrassment will result to the administrators, or to the administration, in the orderly effort to reduce such a claim to judgment and possession.

ID.—APPEAL FROM DECREE OF PARTIAL DISTRIBUTION—PARTIES INTERESTED IN ESTATE ARE AGGRIEVED.—A party possessing an interest in such estate is aggrieved by a decree of partial distribution distributing an undivided interest in such a chose in action to another party, and is entitled to appeal therefrom.

ID.—EXECUTORS MAY APPEAL FROM DECREE.—The executors have the right to appeal from any order which is embarrassing to the due administration of the estate, and may appeal from such decree of partial distribution.

APPEAL from a decree of the Superior Court of Santa Cruz County partially distributing the estate of a deceased person. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

J. F. Riley, and Charles W. Slack, for Appellants.

Edward C. Harrison, and Maurice E. Harrison, for Respondent.

HENSHAW, J.—This is an appeal from a decree of partial distribution given under the following circumstances. Contest having arisen over the will of Ellen M. Colton, deceased, all of the parties in interest compounded their differences and entered into a written agreement which provided for the distribution of the estate “after paying the debts, if any, of the decedent, and the necessary costs of administration.” Application for partial distribution was made upon behalf of Helene M. B. Sacher, to whom, under the agreement was to be distributed one-fourth of the estate. At the time of her petition for partial distribution and at the time of the hearing thereof the necessary costs of administration of the estate had not been paid and the greater part of the estate consisted of a claim against the California Safe Deposit and Trust Company appraised at three hundred thousand dollars for the enforcement of which the executors had brought suit, which suit was and still is pending and undetermined. The application was for the distribution to Helene M. B. Sacher of one-fourth of the claim against the California Safe Deposit and Trust Company. The court decreed distribution as prayed for and from its decree the executors and Caroline Colton Dahlgren, to whom, under the agreement was to be distributed one-half of the estate, appealed.

Upon the appeal two propositions are advanced: 1. That the decree is in violation of the written agreement of the parties, who by their agreement covenanted that such distribution should not be made until the necessary costs of administration had been paid, and that these costs, in fact, had not been paid; and 2. That in view of the condition of the assets of the estate it was error for the court to decree partial distribution. Upon both of these propositions appellants’ position is well taken. Respondent relies upon the provisions of section 1661 of the Code of Civil Procedure and construes those provisions as a mandate upon the court to order distribution when the condi-

tions contemplated by the section are found to exist. Generally speaking, this is true, but it is quite within the powers of the parties (and here the parties were all the parties in interest), or for a single party to estop himself by contract or conduct from insisting upon the enforcement of this rule. (*Estate of Glenn*, 153 Cal. 77, [94 Pac. 230].) The written contract of these parties into which they advisedly entered was that distribution should be postponed until the necessary costs of administration had been paid. No attack is made upon this agreement; it is not sought to be avoided upon any legal or equitable grounds and it stands, therefore, as a binding covenant upon all the parties to it. We need not be at pains to consider the advantages to be derived by one or another of the parties by the enforcement of the agreement, whether either or any will sustain any financial detriment or advantage by its enforcement or nonenforcement. Suffice it, that the contract is one within the power of the parties to make, one by the parties advisedly made, and it is binding upon the court in probate unless adequate cause be shown for setting aside its provisions. No such cause is shown. We have said that it is unnecessary to consider the advantages or disadvantages which might result to one or another of the parties to this agreement should the court see fit to enforce, or, as here, to disregard its terms. The contract was based upon a sufficient consideration, the mutual surrender of asserted legal rights, and this being the case, any party to it is entitled to insist upon the fulfillment of its terms regardless of any question of financial gain or loss. Indeed, the real consideration may not be financial at all. Solely by way of illustration it may be said that a father or mother might enter into such a contract to delay distribution to the end of postponing the time when a wayward son might take his legacy in the belief that if the son took the property immediately he would squander it, and if possession was delayed a reformation might have intervened. This, as we say, is only to illustrate the innumerable reasons which might prompt the execution of such a contract as this, aside from reasons purely of financial gain, but whatever the reasons may have been, we repeat, no cause having been shown why the contract should not be observed, the parties to it were entitled to insist upon its terms.

As little doubt may be entertained upon the second proposition. What the court has done without adequate or any cause therefor shown (excepting perhaps the belief entertained by the court that it was acting under compulsion of section 1661 of the Code of Civil Procedure), is to distribute an indivisible chose in action, a chose in action actually in litigation, a claim in suit which could not from its very nature be divided without great embarrassment to the executors in the due conduct of that litigation. Indeed, it may be said, not, of course, as a proposition of law, but as a statement of fact for the guidance of courts in probate that, generally speaking, claims in litigation should not be distributed unless with the full assent of all the parties interested and under circumstances where it is apparent to the court that no embarrassment will result to the administrators, or to the administration, in the orderly effort to reduce such a claim to judgment and possession. (*In re Kittson*, 45 Minn. 197, [48 N. W. 419]; *Murff v. Frazier*, 41 Miss. 408.) By this court it has been said that when an estate is in the condition here shown it is not ready for distribution, our language being: "If the assets are merely claimed to exist, and the right to them is involved in litigation, either by an action brought by the executor or administrator to recover them for the estate, or by an action against the executor or administrator to recover them from the estate, then the estate is not ready for distribution. The very existence of the property as assets is uncertain, and contingent upon the determination of the suits." (*Estate of Ricaud*, 57 Cal. 421.) Such was the precise situation here presented and the distribution was made under the opposition of other parties in interest and the opposition of the executors.

The right of Caroline Colton Dahlgren, as a party aggrieved, to appeal, is beyond question. She not only possessed rights under the contract which were injuriously affected by the decree, but she possessed an interest in the estate which, for the reasons indicated, were liable to suffer detriment because of the decree. The test laid down in *Adams v. Woods*, 8 Cal. 306, "Would the party have had the thing if the erroneous judgment had not been given? If the answer be yea, then the person is the party aggrieved," however satisfactory to the case then under consideration, by no means affords a complete definition of the phrase "party aggrieved," nor has

it ever in this state been held to afford such a complete definition. Under our decisions any person having an interest recognized by law in the subject matter of the judgment, which interest is injuriously affected by the judgment, is a party aggrieved and entitled to be heard upon appeal. As to the appeal of the executors there can be no doubt of their right to appeal from any order which is embarrassing to the due administration of the estate. (Code Civ. Proc., secs. 938, 963, 1660; *Estate of Kelley*, 63 Cal. 106; *Estate of Ryer*, 110 Cal. 556, [42 Pac. 1082]; *Estate of Heydenfeldt*, 117 Cal. 551, [47 Pac. 713].) That a decree made under these circumstances is so embarrassing has already been declared.

The decree appealed from is therefore reversed.

Melvin, J., and Lorigan, J., concurred.

Hearing in Bank denied.

In denying the hearing in Bank the court in Bank rendered the following opinion on October 26, 1912:

THE COURT.—In this case the discussion in the opinion in Department Two relating to the first proposition advanced by the appellant—namely, that the decree is in violation of the written agreement of the parties, is withdrawn. The court is satisfied with the discussion and decision upon the second proposition and that the case was properly reversed upon the grounds therein stated.

Petition for rehearing is denied.

[Sac. No. 1944. Department Two.—September 27, 1912.]

VICTORIA ALDEN, Appellant, v. C. E. MAYFIELD,
Respondent.

[Sac. No. 1940. Department Two.—September 27, 1912.]

VICTORIA ALDEN, Respondent, v. C. E. MAYFIELD,
Appellant.

LANDLORD AND TENANT—ORAL WAIVER BY AGENT OF NOTICE TO INCREASE RENT.—After the service on a tenant from month to month of a written notice of an increase of rent, an agent of the landlord, having the actual or ostensible power so to do, may waive the increase by a parol agreement with the tenant, and the landlord is bound by the waiver.

ID.—NOTICE TO QUIT—WAIVER OF NOTICE BY AGENT OF LANDLORD—REVOCATION OF AGENT'S AUTHORITY—ACTS CONSTITUTING WAIVER UNKNOWN TO LANDLORD.—Such a tenant, after the service on him of a formal notice to quit and surrender possession of the leased premises, cannot justify his subsequent withholding of the possession because of an asserted waiver of the notice to quit by an agent of the landlord, if he knew at the time of the performance of the acts claimed to constitute the waiver, that the agent's authority in the matter had been revoked, and the performance of such acts were unknown to the landlord.

ID.—TENANCY FROM MONTH TO MONTH—INTERFERENCE WITH TENANCY—LOSS OF PROFITS.—A tenant under a tenancy from month to month is as much entitled to damages for an illegal interference with his tenancy as is any other tenant, and in proper cases damages may be predicated upon a loss of prospective profits.

ID.—APPEAL—ERRONEOUS CONCLUSIONS OF LAW—DIRECTION TO ENTER PROPER JUDGMENT UPON FINDINGS—UNATTACKED FINDINGS SHOWN ERRONEOUS IN DIFFERENT APPEAL.—Ordinarily where an appeal presents a case where the findings are unattacked and are sufficient to support a judgment in favor of the appellant, but the conclusions of law are erroneously drawn from the findings, the appellate court will reverse the judgment, with directions to the lower court to enter a correct judgment upon the findings. It will refuse, however, to do so, in any case where such a direction would be to countenance a grave injustice, and refuses to do so in the appeal in question, as it is shown, by another appeal in the same case, that a controlling finding is unsupported by the evidence.

APPEALS from a judgment of the Superior Court of Solano County and from an order refusing a new trial. A. J. Buckles, Judge.

The facts are stated in the opinion of the court.

W. U. Goodman, for Plaintiff, appellant in No. 1944 and respondent in No. 1940.

T. T. C. Gregory, for Defendant, respondent in No. 1944 and appellant in No. 1940.

HENSHAW, J.—Plaintiff sued in ejectment to recover possession of certain property, which possession was withheld by defendant after service upon him of thirty days' notice to quit. In separate counts and causes of action plaintiff sought to recover, besides the possession of the property, damages for its detention and the value of the rents and profits. (*Sullivan v. Davis*, 4 Cal. 291; *Johnson v. Visher*, 96 Cal. 310, [31 Pac. 106].)

The admitted facts are that Victoria Alden, plaintiff, was the owner of a store in Suisun which the defendant had been occupying under a tenancy from month to month, paying therefor a rental of sixty-five dollars a month. In June, 1908, there was served upon the defendant a notice of an increase of rent from sixty-five dollars a month to one hundred dollars a month. This increase in rent was never paid by defendant, but defendant continued in possession, paying sixty-five dollars a month and contending that the notice of an increase of rent was waived by R. C. Haile, agent of the plaintiff, duly authorized to make such waiver. Haile resided in Suisun, Mrs. Alden, his mother, resided in Oakland, and Haile managed her property. By direction to Haile the rent was to be deposited each month in a local bank to the credit of plaintiff. In the latter part of March, 1910, Mrs. Alden was at her bank in Suisun and discovered that the defendant had been paying not one hundred dollars a month but sixty-five dollars a month. She sought and had an interview with him at the bank, in which interview she demanded the payment of the back rent. Defendant refused to acknowledge the indebtedness saying that her son

Richard had declared that the rent should remain without increase. Mrs. Alden then informed him that Mr. Haile had no authority to reduce the rent, and upon the defendant's offer to pay one hundred dollars a month if he could secure a lease for a term of years, Mrs. Alden answered that she declined to have anything further to do with him and would not let him remain longer in possession of the property under any circumstances. Mrs. Alden then immediately consulted her attorney, and upon May 2, 1910, served upon defendant a formal notice to quit and surrender possession upon the last day of May, 1910. (Civ. Code, sec. 827.) The complaint alleged that the defendant "refused on the 1st day of June, 1910, to deliver up said possession of the said premises to said plaintiff and continues in possession of same without the consent and against the will and wish of plaintiff; that said defendant now withholds the possession of said premises from the said plaintiff." This allegation is not denied by the answer. But notwithstanding his failure to deny, defendant undertakes to plead a waiver of the notice to quit and does so by averring that under the terms of the lease he was to deposit the rental upon the first of each and every month in a local bank to the credit of plaintiff; that all sums paid as rental have been so deposited; that on or about June 1, 1910, and on or about the first of each succeeding month defendant has deposited a like sum in like manner; that "R. C. Haile, agent of plaintiff as aforesaid, is duly authorized to draw from the bank any money on deposit there to the credit of plaintiff; that said R. C. Haile knew that the notice to quit had been served as therein alleged ever since on or about April 12, 1910, and with full knowledge of the breach thereof and that defendant was in possession of the said premises contrary to the said notice, accepted the said sum deposited as the rent for June and with full knowledge thereof has accepted a like sum on or about the 1st of each and every succeeding month.

Appeal No. 1944. The foregoing outlines the important issues presented upon this appeal, which is taken by the plaintiff from the judgment and from the order denying her motion for a new trial. The court's findings were in favor of the defendant as to the agency of Haile and his waiver of the increase in rent to one hundred dollars a month,

which was to go into effect upon the thirty-first day of July, 1908. The waiver it is found was an oral waiver. Upon the waiver of the notice to quit and surrender possession, the findings follow the allegations of the answer.

Appellant attacks these findings as being unsupported. The first to invite consideration are those which find that Haile, the duly authorized agent of plaintiff, waived the increase of rent from sixty-five dollars to one hundred dollars a month. Without reviewing the evidence it is enough to say that there is sufficient to establish the agency and the power of Haile to make this waiver. It is true that the notification was in writing and that the waiver was by parol agreement. (Civ. Code, sec. 1698.) But it sufficiently appears from the unconditional acceptance by the agent of the lesser amount of rent that the oral agreement became executed and therefore binding. It is argued that Mrs. Alden knew nothing of this purported waiver, and this is doubtless true. Yet she had clothed her son as her agent, actual or ostensible, with sufficient power to make the waiver, and she is bound by his conduct in so doing. True it is, also, that Haile, who at the trial was dead, had denied by verified answer that he had ever agreed to such a waiver. True it is that in other respects the evidence upon the matter is sharply conflicting, but, as has been said, there is sufficient to support the finding of the court in this regard.

The same, however, cannot be said of the finding of the waiver of the notice to quit. All the facts and all the circumstances demonstrate that there was no waiver and that the defendant never honestly believed that there was a waiver. Those facts and circumstances are the following: He knew, and so testifies, that in March, 1910, Mrs. Alden insisted upon the payment of the back rent and refused to accept his explanation that her son had waived it, then telling him in terms that her son had no authority so to do. He knew, and so testifies, that because of this difference and of other grievances which Mrs. Alden entertained against him, she refused and to him declared that she refused to allow him longer to occupy her premises upon any terms. He knew that the notice to quit was thereafter promptly served upon him. He knew who Mrs. Alden's attorney was and consulted that attorney, seeking a way out of his diffi-

culties, and was by this attorney informed that he, the attorney, had sole charge of the matter and that Haile had nothing further to do with the property. He was by this attorney informed that the notice to quit would be enforced and that he would be expected to deliver possession upon the first day of June following. In his answer he even admits that he was withholding possession without the consent and against the will of the plaintiff, but seeks to justify that holding because of an asserted waiver by the agent of plaintiff. And in what did that waiver consist? His tenancy terminated with the beginning of June 1st. Yet upon June 1st he deposits with the bank not even the one hundred dollars a month rental insisted upon by Mrs. Alden, but sixty-five dollars. He did this without notice to Mrs. Alden, to her attorney, or to Haile. This action in ejectment was begun the day after. Nothing could more clearly evince a refusal to waive the terms of the notice, or a refusal to accept rent, than the commencement of this action, and yet it is contended and found, because this amount was thus slipped into the bank and by the bank placed to the credit of the plaintiff, that she had waived her right to enforce the termination of the tenancy. To this point the contention is so preposterous as not to merit discussion. But it is said that the tenant continued month by month so to deposit the sixty-five dollars, and that Haile must have known of this, and that therefore Haile's acceptance and use of the money constitutes the waiver, though admittedly Haile's principal, the plaintiff herein, knew nothing about it. The difficulty with this argument is that the defendant was informed before the deposit of money, both by the principal and by her attorney, that Haile no longer had anything to do with the matter, and we repeat that defendant's endeavor under those circumstances to re-establish the relationship of tenancy with the landlord who had repudiated him and terminated the tenancy was but a shallow bit of subterfuge and trickery. In this connection it should be added that doubtless on the theory that Haile's agency and his power to waive the terms of the notice to quit had been established, the court improperly refused to allow plaintiff to testify that only at the trial had she for the first time discovered that defendant had so deposited the money, that such deposits

were without her authority and that she instructed the bank to return them. Still further in this connection it is to be noted that the defendant does not deny, as it was incumbent upon him to deny, the allegation that he was holding over against the will and consent of the plaintiff. This he admits and the admission under the circumstances is a pregnant one. It amounts to an admission that he knew there was no waiver and no continuation of the tenancy so far as plaintiff was concerned. The testimony as to the receipt of the rents amounts to no more than this. The plaintiff owned other pieces of property and had other tenants thereon. One and all they were instructed to deposit their rents when due to her credit in the local bank. The local bank received these deposits and credited them to the account of plaintiff. Not having received positive instructions from the plaintiff to the contrary, they received the deposits made by defendant on and after June 1st, entered them in a bank-book and credited them to the account of plaintiff. It does not appear except inferentially, and because of the fact that Haile had possession of the bank-book from time to time, that even Haile knew that defendant was depositing moneys for rent, and it certainly does not appear that Haile ever knew that defendant was claiming that he (Haile) had assented to a continuation of the tenancy and to a waiver of the notice to quit. The unconditional acceptance by a landlord of moneys as rent, which rent has accrued after the time the tenant should have surrendered possession, will constitute strong evidence of the landlord's waiver of his notice to quit. (18 Am. & Eng. Ency. of Law p. 402.) But waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. (*Silva v. Campbell*, 84 Cal. 422, [24 Pac. 316].) Therefore the evidence, so far from establishing a waiver, with all that a waiver implies—a meeting of minds and the intentional forbearance to enforce a right—clearly establishes that there was no waiver, but only an effort by defendant surreptitiously to do something which might in some way advantage him and enable him the longer to hold possession. This is made manifest from the fact that defendant was not prepared to leave the building, had no other location or store in which to move his goods, and

was desirous of remaining where he was until he could secure other accommodations. The finding in this respect being unsupported it follows that the judgment and order appealed from should be reversed and the cause remanded for a new trial. And it is ordered accordingly.

Appeal No. 1940. Besides answering plaintiff's complaint, defendant cross-complained and presented as grounds of cross-complaint the disturbance of his quiet possession and the injury to his business occasioned by the acts of Haile, agent of plaintiff, while defendant was occupying the premises as the tenant of plaintiff. In particular the cross-complaint charged that:

"Within the last year, and both before and after June 1, 1910, the said R. C. Haile, agent as aforesaid, entered the said premises and threatened to immediately remove defendant and his said stock of merchandise from the premises. Said R. C. Haile on all of these occasions told the defendant that he owed many thousands of dollars back rent and requested its payment, and demanded possession of the premises on behalf of plaintiff and as her agent and said that the said plaintiff was entitled to the possession thereof. The said R. C. Haile, agent as aforesaid, on all of these many occasions talked in a loud and threatening manner. On one of the said occasions it was necessary for the defendant to eject the said Haile from the said premises on account of the great disturbance he was creating."

The court found in accordance with the allegation last above quoted and further found that "the quiet enjoyment and possession of defendant was molested and disturbed to such an extent that he concluded to sell and did sell his said stock at a great sacrifice and at more than \$3,127.59 below its real worth and cost and suffered a loss thereby including prospective benefits of more than \$7,691.22." Further findings of the court are identical with those just considered in the previous appeal, and are to the effect that the tenancy was continued after June 1st, through the waiver of the notice to quit. The court's unexplained conclusion of law from these findings is that the plaintiff take nothing by his cross-complaint, and judgment upon the cross-complaint was entered accordingly. From that judgment cross-complainant and defendant Mayfield appeals upon the

judgment-roll alone, and urges, with justice, that the tenant under a tenancy from month to month is as much entitled to damages for an illegal interference with his tenancy as is any other tenant. This is true. (*Heilbron v. Centerville & Kingsburg Irr. Ditch Co.*, 76 Cal. 8, [17 Pac. 932]; *Dwyer v. Carroll*, 86 Cal. 298, [24 Pac. 1015]; *McDowell v. Hyman*, 117 Cal. 67, [48 Pac. 984].) And in proper cases damages may be predicated upon a loss of prospective profit. (*Lambert v. Haskell*, 80 Cal. 611, [22 Pac. 327]; Civ. Code, sec. 3300; *Hawthorne v. Siegel*, 88 Cal. 159, [22 Am. St. Rep. 291, 24 Pac. 1114].) Appellant next contends upon the authority of such cases as *Overacre v. Blake*, 82 Cal. 77, [22 Pac. 979], that this appeal presents a case where the findings are unattacked and are sufficient to support a judgment in his favor, but that the conclusions of law are erroneously drawn from the findings, that since the findings establish that the judgment should be in his favor, this court will reverse the judgment upon appeal, with directions to the court below to enter a correct judgment upon the findings. In many cases, indeed it may be said that ordinarily, such would be the ruling and direction of this court. But not so here, nor in any case where to do so would be to countenance a grave injustice. In this case, as in the preceding appeal, the whole superstructure rests upon the finding of the continuation of defendant's tenancy after June 1st. That finding, as we have said and discussed, is unsupported, and upon direct appeal the case in which that finding has been made has been reversed. To grant appellant's request in the present instance would be to countenance a judgment based upon this unsupported finding and cast the plaintiff in damages in the sum of over seven thousand dollars, for no dollar of which the record shows her justly liable. Under the plenary powers vested in this court by section 53 of the Code of Civil Procedure, it will order a judgment only in a proper case and order a new trial where the action seems to demand it. Certainly this is such an occasion. For, in addition to what has already been said, the allegation of the cross-complaint and the finding of the court thereon still further negative the idea that Haile could have waived or could have believed that he had waived the notice to quit, or could in any other way have recognized the

continuance of the tenancy, since the finding is that before and after June 1st he was repeatedly threatening to remove defendant and his stock of merchandise from the premises and demanding possession of the premises—conduct absolutely foreign to any notion of a waiver and a renewal of tenancy.

Wherefore the judgment here appealed from is reversed and the cause remanded for a new trial.

Melvin, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[S. F. No. 6079. Department Two.—September 27, 1912.]

In the Matter of the Estate of CATHERINE DONNELLAN, Deceased. JANE TRACY (a sister of said Deceased), MARY RILEY, KATIE RILEY, and ANNIE SHERIDAN (nieces of said Deceased), and JAMES RILEY and THOMAS RILEY (nephews of said Deceased), Appellants; THOMAS REILLY (Riley), (a brother of said Deceased), and MARY SMITH (a niece of said Deceased), and HARRY A. BYRNES, Executor of the last will of said Deceased, Respondents.

WILL—CONSTRUCTION OF LATENT AMBIGUITY—MISNOMER OF BENEFICIARY—EXTRINSIC EVIDENCE TO REMOVE AMBIGUITY.—The testatrix, a native of Ireland, and who had come to San Francisco about fifty-five years before her death there, by her will devised one-fourth of the residue of her estate “to my niece Mary, a resident of New York, said Mary being the daughter of my deceased sister Mary, the name of my niece Mary I do not know as I understand she is now married, nor am I sure of niece Mary’s maiden name, as her mother, my sister Mary, was twice married, but I believe my niece’s maiden name was Mary Donohoe.” At the time the testatrix left Ireland she had a sister Mary, who remained there. This sister, by her first marriage, had two daughters, Annie and Mary. After the death of her first husband she married a man named Donohoe. The daughter Mary married a man by the name of Smith, and continued to reside in Ireland, and had never been in the United States. The other daughter, Annie, married a man

by the name of Sheridan, came to the United States about twenty-five years ago, and at the date of the will lived and still lives in Brooklyn, New York. The testatrix left Ireland before either of the daughters of her sister Mary was born, never saw either of them, and, being unable to write, never personally wrote to either of them. *Held*, that the will disclosed a latent ambiguity and uncertainty as to the person whom the testatrix intended to indicate by such provision, to explain which extrinsic evidence was admissible, and that such evidence showed that the person intended to be designated as beneficiary was the testatrix's niece Annie, who was a resident of New York.

ID.—APPLICATION OF FACTS TO LANGUAGE OF WILL—CONSTRUCTION A QUESTION OF LAW.—Wherever doubt arises as to the meaning of a will, such doubt is resolved by construction, and that construction is one of law—it is an application of legal rules governing construction either to the will alone or to properly admitted facts to explain what the testator meant by the doubtful language. In those cases where extrinsic evidence is permissible, there may be a conflict in the evidence itself, in which case the determination of the conflict results in a pure finding of fact. The facts thus found are still to be applied to the written directions of the will for the latter's construction, and that construction still remains a construction of law.

ID.—CONFLICT IN EXTRINSIC EVIDENCE—CONSTRUCTION OF WILL IN PROBATE COURT SUBJECT TO REVIEW ON APPEAL.—In such cases, where the evidence of the facts is in conflict, the findings of facts by the jury or trial court will not be disturbed on appeal. But the application to the will itself of the facts found, admitted or established without conflict, presents a question of legal construction, which is purely a question of law, and the construction of the court in probate is subject to review on appeal to determine whether or not a wrong construction at law has been reached.

ID.—LIMITED PURPOSE OF EXTRINSIC EVIDENCE.—In all cases where extrinsic evidence is admissible to aid in expounding the will, the evidence is limited to the single purpose of explaining and interpreting the language of the will, and is never permitted to show a different intent or a different object from that disclosed (though perhaps obscurely) by the language of the will itself.

ID.—CLASSES OF WILLS PRESENTING LATENT AMBIGUITIES.—Broadly speaking, there are two classes of wills presenting latent ambiguities, for the removal of which resort to extrinsic evidence is permissible. The one class is where there are two or more persons or things exactly measuring up to the description and conditions of the will, the other class is where no person or thing exactly answers the declarations and descriptions of the will, but where two or

more persons or things in part, though imperfectly, do so answer. The will in question belongs to this latter class.

ID.—PREFERENCE NOT GIVEN TO NAME OVER DESCRIPTION.—In resolving such latent ambiguity there is no rule of construction which prefers a name to a description.

ID.—EVIDENCE—HEARSAY—CONTENTS OF LETTERS.—The testimony of a witness as to the contents of a letter, without proof either of the destruction of the letter or that the witness had ever read it, is inadmissible hearsay; so, also, is the declaration of a witness as to the contents of letters, whose destruction was not proved, which the witness had never read, and the contents of which he was testifying to upon statements of those contents made to him by another.

APPEAL from a decree of the Superior Court of the City and County of San Francisco, distributing the estate of a deceased person. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Wm. S. McKnight, for Mary Riley et al., Appellants.

Cullinan & Hickey, for estate of Jane Tracy, deceased, Appellant.

T. E. K. Cormac, for Thomas Reilly et al., Respondents.

John C. Quinlan, for executor, Respondent.

HENSHAW, J.—Catherine Donnellan died testate in the city and county of San Francisco, and her will was there probated. The tenth clause of her will is as follows:

“The one-fourth of the rest and residue of my property I will devise and bequeath to my niece Mary, a resident of New York, said Mary being the daughter of my deceased sister Mary, the name of my niece Mary I do not know as I understand she is now married, nor am I sure of niece Mary’s maiden name, as her mother, my sister Mary, was twice married, but I believe my niece’s maiden name was Mary Donohoe.”

Upon petition for distribution Annie Sheridan, appellant herein, and Mary Smith, respondent herein, each claimed distribution as the person meant in the paragraph above

quoted. The court's decree favored Mary Smith. As has been said, Annie Sheridan appeals, and so also do certain heirs at law, who insist that the latent ambiguity disclosed to exist in paragraph 10 has not been removed by extrinsic evidence; wherefore the bequest fails and the property descends to them as heirs at law.

The evidence showed that Catherine Donnellan, born Catherine Riley, the testatrix, came to San Francisco from Ireland about fifty-five years ago, and there died, after the death of her husband without issue. At the time she left Ireland she had a sister Mary who remained in Ireland. This sister, by her marriage to Michael Cook, had two daughters, Annie and Mary. After the death of Cook she married John Donohoe. The daughter Mary married a man by the name of Smith, and lives in Ireland with the testatrix's brother Thomas Riley. Mary has never been in the United States. The other daughter, Annie, married a man by the name of Sheridan, came to the United States about twenty-five years ago, and at the date of the will lived and still lives in Brooklyn, state of New York. The testatrix left Ireland before either of the daughters of her sister Mary was born, never saw either of the daughters, and, being unable to write, never personally wrote to either of them. This statement discloses the latent ambiguity and uncertainty as to the person whom the testatrix intended to indicate by the tenth paragraph of her will. Both Mary and Annie were her nieces, both were the daughters of her sister Mary, and both were the stepdaughters of John Donohoe, the second husband of testatrix's sister. If the testatrix intended the niece Mary, then there is a grave error in description, for the niece Mary was never a "resident of New York." If the testatrix meant to designate the niece who was a resident of New York, then that niece was Annie and not Mary.

Extrinsic evidence was taken, as was proper, to explain this latent ambiguity, and that evidence was this: In May, 1909, testatrix gave instructions to her attorney to draw her will. This he did, and was a witness to it. The testatrix told her attorney that she had a sister named Mary who had a daughter named Mary; that she did not know where the daughter was; she thought she was in New York; she

did not know what her name was. "In fact," concludes Mr. Quinlan in his testimony, "everything that she told me about Mary I included in the description as she gave it to me and put it in the will as closely as I could adhere to her general statements to me." Still further the testatrix explained to her attorney that she would not make provision so that another branch of her family "the Boston Rileys" would take the share allotted to the niece in the event that Mary could not be found, because "she had made inquiries from the Riley family in Boston as to the whereabouts of this party, and that they had refused to give her information, and she thought that if they were interested in this portion of the estate that they would not make any endeavor to find or locate this person." The further testimony was that Annie was the elder sister, Mary the younger. Thomas Riley, a nephew of the deceased, living in Boston, Massachusetts, testified that he received a letter from the testatrix in her lifetime, which letter was appended to the deposition, and in which the following inquiry was made, "Let me know about my sister Mary's daughter"; that he had written to Catherine Donnellan in answer to this letter, and in so writing wrote about the niece Annie Sheridan, who was the only niece of Catherine Donnellan who ever lived in New York. Annie Sheridan deposes that her father died when she was about six years of age, and at that time the testatrix, living in San Francisco, wanted her, Annie, to come to San Francisco to live with testatrix; that she, Annie, had been called Mary when she first came to America, and had been so called by Margaret Riley, an aunt by marriage at Boston, where she, Annie Sheridan, first lived.

Over objection and exception the court admitted in evidence from the deposition of Mary Smith the following: "I remember my mother getting a letter from the decedent over twenty years ago, in which she asked my mother to send me out to her home in California, as the decedent stated that all her family were dead." And also the following from the deposition of Thadeus Doyle: "Mary Riley, the deceased (mother of Annie Sheridan and Mary Smith), told me several times that her sister Catherine (the testatrix) was married to a man named Donnellan, and that she received letters from America, and that Catherine Donnellan

wanted Mary Riley's daughter, the present Mary Smith, to be sent to her in America." This is in substance all of the extrinsic evidence given to relieve from the latent ambiguity and to aid in the construction of the will. It will be noted that it presents absolutely no conflict.

It is a fundamental and indisputable proposition that wherever doubt arises as to the meaning of a will, such doubt is resolved by construction and that construction is one of law,—it is an application of legal rules governing construction either to the will alone or to properly admitted facts to explain what the testator meant by the doubtful language. In those cases where extrinsic evidence is permissible there may be a conflict in the extrinsic evidence itself, in which case the determination of that conflict results in a finding of pure fact. But when the facts are thus found, those facts do not solve the difficulty. They still are to be applied to the written directions of the will for the latter's construction, and that construction still remains a construction at law. In such cases where the evidence of the facts is in conflict, it is permissible for the court or for the jury, to find the facts and those findings, under firmly established principles, will not here be disturbed. But the application to the will itself of the facts found, admitted or established, presents a question of legal construction, which is as purely a question of law as is a construction of the will without resort to extrinsic evidence. Therefore, if the facts have been found by the court upon conflicting evidence, this court, accepting the findings, will still review the construction of the court in probate and determine whether or no a wrong construction at law has been reached. If the facts are admitted, or established without conflict, the justness of the application which the court made of those facts in its construction will equally, as a legal proposition, be the subject of review. Again, it is fundamental that in all cases where extrinsic evidence is admissible to aid in expounding the will, the evidence is limited to this single purpose. It is considered, for the purpose of explaining and interpreting the language of the will, and is never permitted to show a different intent or a different object from that disclosed (though perhaps obscurely) by the language of the will itself. (6 Wigmore on Evidence pp. 2472-4.) So it is declared by section 1340 of the Civil Code: "When, applying a will, it

is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intentions cannot be received."

Broadly speaking, there are two classes of wills presenting latent ambiguities, for the removal of which ambiguities resort to extrinsic evidence is permissible. The one class is where there are two or more persons or things exactly measuring up to the description and conditions of the will, as "to my niece, daughter of my sister Jane, residing in Alameda County," when there are two or more nieces, daughters of his sister Jane so residing; or a devise "of my ranch in Alameda County" when the testator owns two or more ranches in that county. The other class is where no person or thing exactly answers the declarations and descriptions of the will, but where two or more persons or things in part though imperfectly do so answer. To this latter class belongs the case under consideration. The very apparent distinction between the two classes is this, that in the first class resort is had to extrinsic evidence to determine the person or thing upon whom or which the language of the will is to operate. That person or thing once being determined, as matter of law, the construction follows so much as matter of course that the legal aspect of it is sometimes regarded as negligible. And thus in some cases it is said that under circumstances such as this, the court's or the jury's determination of the intent of the testator is one of fact. Logically this is not true, for always must the intent of the testator be determined by the will itself and that determination is a conclusion of law. But the person or thing which is the matter in doubt being decided upon as matter of fact, the application of the intent of the will that that person should receive the property, or that the property should go to such a person, presents absolutely no difficulty. For that reason, as has been said, the fact that there still remains to the court the duty of construing the will in this particular is sometimes lost sight of. Thus a will gives a legacy "to my niece, daughter of my sister Jane, in San Francisco." It is disclosed that the testator has a sister Jane who lives in San Francisco, and

who had two nieces. Extrinsic evidence is admitted to show that at the time of the making of the will the sister Jane had but one daughter, that the testator knew this niece, that before the birth of the second niece he departed from the state, was never thereafter in communication with his sister, and did not know of the existence of the second niece. Here the finding of fact would clearly be that the testator had in mind the elder niece. This finding at once removes the only difficulty in the way of construction; but, nevertheless, legally and logically, no matter how simple may be the construction which follows, there is the necessity of construction in the declaration by the court that the testator by his will did bequeath a legacy to the elder niece.

Much more apparent is this legal construction in the second class of cases where errors in description or designation are found, so that, however the will may be construed, the construction results in rejecting some part of such designation or description. Here, manifestly, the construction is one of law, because it necessarily results in striking from a written instrument some words or phrases contained therein as being erroneous and not expressing the true meaning and intent of the testator. To these propositions, which we think to be very plain, it is unnecessary to do more than cite *Taylor v. McCowen*, 154 Cal. 798, [99 Pac. 351]; *Estate of Dominici*, 151 Cal. 181, [90 Pac. 448]; *McKeough's Estate v. McKeough*, 69 Vt. 41, [37 Atl. 275]; *In re Welch's Will*, 78 Vt. 16, [61 Atl. 145]; 2 Underhill's Law of Wills, sec. 909 et seq.; 2 Woerner's American Law of Administration, p. 893; Wigram on Wills (O'Hara's ed.) 142; *Charter v. Charter*, 7 H. L. 364; *Hiscocks v. Hiscocks*, 5 M. & W. 352.

In the case before us the court is called upon to do this precise thing. It becomes its duty to declare either that the use of "Mary" as the name of the devisee was error, or that the use of the phrase "a resident of New York" is erroneous description, and should therefore be rejected; or, finally, to declare that the doubt raised by the latent ambiguity cannot be resolved and the devise or bequest must lapse. If the name is rejected as error, then the devise or bequest is a perfectly clear and intelligible one—"to my niece, a resident of New York, said niece being the daughter of my deceased sister Mary." If the description be rejected, the

devise or bequest becomes equally clear and intelligible and is "to my niece Mary, said Mary being the daughter of my deceased sister Mary." As has been said, the evidence was without conflict, and the court by its construction adopted the theory that the name controlled and that the description was erroneous and should therefore be rejected. But if, as respondent implies, the court adopted the maxim "*veritas nominis tollit errorem demonstrationis*" as controlling, and the declaration of Redfield that "where persons are correctly named, any amount of false description will be rejected as surplusage, and even a great degree of certainty will not induce a court to give the devise of a person named to one described but not named," (Redfield, 3d ed., 404), it unduly extended the application of the maxim and the meaning of the text-writer. There is no rule in the construction of wills which prefers a name to a description. The matter is clearly expounded in Theobald on Wills, p. 268. He says:

"Sometimes a correct name is given coupled with an erroneous description. There is a person of that name but no one to whom the description applies. The person of that name takes. '*Veritas nominis tollit errorem demonstrationis.*'"

"On the other hand if there is no one who answers to the name but there is a person who answers to the description the latter may take '*Nihil facit error nominis cum de corpore constat.*'"

"There is more difficulty where a person is indicated by name and description and there is no one who answers both name and description, but there is some one who answers the name and some one who answers the description.

"For the purpose of ascertaining whether there is a description which is not consistent with the name the whole will must be looked at. . . . In these cases the person intended must be ascertained by a consideration of all the circumstances of the case. It has been said that 'there are more instances in which the demonstration prevailed than in which the name prevailed.' " (See, also, 1 Jarman on Wills, 6th ed. pp. 379 and 381; Abbott's Trial Evidence, p. 176; *Drake v. Drake*, 8 H. L. Cas. 172.) Thus if a testator should give a devise "to my nephew John, who is and for many years has been a member of my family," and it should

prove that his nephew James and not John had been such inmate, it would be ridiculous to allow the name to prevail over the description. In every case the court seeks to arrive at the testator's intent, and the application of general rules are but aids, and sometimes but feeble aids, to that endeavor.

What, then, fairly appears by the uncontradicted evidence in this case? First, that the testatrix knew that she had one niece, the daughter of her sister Mary. Nothing in the evidence from the beginning to the end points to knowledge upon her part of the existence of more than one such niece. Second, she thought this niece's name was Mary, but she knew that the niece whom she had in mind had come to America and was living in New York. She even wrote to her Boston relatives to learn the exact whereabouts of this niece whom she knew had come to America. All of the evidence of her inquiries concerning the whereabouts of this niece, her refusal to will over to the Boston Rileys the share bequeathed to the niece in case the niece should not be found, points irresistibly to the conclusion that she had in mind the niece who was in America. All of this evidence is absolutely unexplainable upon the theory that the niece she meant was the one who was living with her mother in Ireland and who had never left her home. Still less possible is it to explain the theory that Mary was meant, if credit be given to the hearsay evidence admitted by the court; for whatever else that evidence shows, it establishes knowledge upon the part of the testatrix that Mary was not and had not been in America, because she desired Mary to come to America. Again it appears affirmatively that the testatrix did know that her niece was in America and (bearing in mind that she knew of the existence of but one niece) it further appears that she wrote to the Boston Rileys to learn the exact whereabouts of the niece in America. Balancing then the probabilities of error, and considering that Mary was the mother's name, and the name which it would not be unlikely her daughter would bear, it appears to us that the inference that the niece in America, the one "resident in New York" was intended is overwhelming, and that the error was an error in name and not in description. Rejecting from the consideration the evidence above quoted, which without question

was improperly admitted, and the inference becomes well nigh irresistible. Treating for a moment the evidence improperly admitted. The first is the declaration of the niece Mary as follows: "I remember my mother getting a letter from the decedent over twenty years ago, in which she asked my mother to send me out to her home in California, as the decedent stated that all her family were dead." The witness purported to give the contents of a written instrument—a letter—without proof either of the destruction of the letter or that the deponent had ever herself read the letter. The second is the declaration of Thadens Doyle, also as to the contents of letters, whose destruction was not proved, which Doyle never asserts that he read, and the contents of which he was testifying to upon statements of those contents made to him by another. Here was hearsay upon hearsay, and it needs no citation of authority to support the statement that such evidence was inadmissible.

Finally, it should be added, as to the appeal of those contending that the devise lapses because the ambiguity is not removed by parol evidence, that what this court has already said is a declaration that the extrinsic evidence is sufficiently explicit to solve the ambiguity and points to the niece Annie as the one meant by the testatrix.

Therefore the appeal is sustained, and in the indicated particulars the decree is reversed with directions to the trial court that if there be no other or further evidence presented upon the rehearing of the matter, section 10 of the will shall be construed to apply to and to mean the niece Annie.

Lorigan, J., and Melvin, J., concurred.

[S. F. No. 5441. In Bank.—October 1, 1912.]

EDWARD H. FORESTIER, Appellant, v. FRANK JOHNSON et al., Respondents.

NAVIGABLE WATERS—FLY'S BAY—FINDING—EVIDENCE.—The finding that the body of water commonly known as "Fly's Bay," the same being a portion of, and opening into and connected with the Napa River, is navigable water, is held supported by the evidence.

ID.—CONTROL OF NAVIGABLE WATERS—TIDE LANDS—LIMITATIONS ON STATE'S POWER OF DISPOSITION—TITLE SUBJECT TO PUBLIC TRUST. So far as may be necessary for the regulation of interstate and foreign commerce, the United States has the paramount right to control the navigable waters within the several states. The state can make no disposition of the soil beneath, or allow any interference with the navigable waters, that will impair this right and power of the United States. The title to the soil beneath such waters, including all that is covered with water at ordinary high tide, as well as that lying below low tide, belongs to the states by virtue of their sovereignty, and is held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing thereon freed from the obstruction or interference of private parties. This trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

ID.—SALE OF TIDE LANDS SUBJECT TO PUBLIC EASEMENT IN NAVIGABLE WATERS.—Sections 3440 to 3493½ inclusive of the Political Code authorizing the sale of swamp lands, salt marsh, and tide lands, conceding that they authorize the sale of the soil covered by water at ordinary high tide, do not authorize a sale which destroys or vacates the dedication of the water to the public uses of navigation and fishery, or which vests in the grantee the right to prevent the public use and convert both land and water to his own private use and possession. Such sections only design to dispose of tide lands subject to the public easements in any navigable waters included within the tracts disposed of.

ID.—CONSTITUTIONAL LIMITATIONS ON POWER OF STATE TO SELL TIDE LANDS—CONSTRUCTION OF PATENT.—The provisions of section 2 of article XV of the constitution of 1879, that no person possessing tidal lands of a bay, estuary, or other navigable water, whether the possession be lawful or unlawful, can be permitted to obstruct the free navigation thereof, are mandatory and prohibitory, and operate as a limitation upon the power of the legislature in the matter of the disposition of tide lands, and are to be considered as incorporated in any grant or patent of such lands the same as if inserted therein, and to qualify it so that the estate granted is limited to the permitted uses. The result is that a grantee of such lands may claim the portions of the lands purchased which are not capable of navigation, but that he must leave the navigable waters open for public use.

Id.—CODE PROVISIONS SIMILAR TO PREVIOUS STATUTES—PRESUMPTION OF SIMILARITY OF PURPOSE AND MEANING.—It is to be presumed that the legislature intended the provisions of the Political Code respecting the disposition of tide lands, which did not substantially depart from the statutory provisions previously existing, to have substantially the same purpose, object, and meaning.

Id.—GRANT OF TIDE LAND—NONINCLUSION OF NAVIGABLE WATERS NOT DETERMINED.—The action of the surveyor-general in receiving the application, approving the survey and preparing the patent for tide lands, or of the governor in executing it, cannot be considered as a determination by the state that the land does not include any navigable water, or as a destruction or discontinuance of the public easement therein, or as an exercise of the functions of the state concerning the control of navigable waters.

Id.—GRANTEE OF TIDE LANDS CANNOT RECLAIM SO AS TO INTERFERE WITH NAVIGATION—EXISTENCE OF NAVIGABLE WATERS AN OPEN QUESTION OF FACT—DEFENDANT MAY SET UP RIGHTS OF NAVIGATION.—Conceding that the title to the soil passes when tide land is purchased from the state, under the code, the question whether it includes within its bounds any navigable waters, and the extent of such navigable waters, are not determined by the sale, but remain open for further adjustment between the purchaser and the state, and the sale does not vest in the purchaser the right to erect reclamation works which may materially interfere with the navigation of such waters. And the question whether or not there is such navigable water over such land must in the mean time remain open as a question of fact, and its existence may be shown by any citizen in defense of an action to prevent his exercise of the public right of navigation secured to him by section 2 of article XV of the constitution.

Id.—POWER OF STATE TO CONTROL NAVIGABLE WATERS—NONEXERCISE OF POWER BY UNITED STATES.—In the absence of the exercise by the United States of its power to control navigable waters and adjust harbor lines for the purpose of regulating interstate and foreign commerce, the state has control and management of such waters, and its mandates upon the subject are binding upon all persons.

Id.—ACTIONS BY GRANTEE OF TIDE LANDS—JUDGMENT UPHOLDING DEFENDANT'S RIGHT OF NAVIGATION—TITLE OF SOIL NOT IN ISSUE—IMMATERIAL FINDING—APPEAL.—In an action by a grantee of tide land to enjoin trespasses thereon, a judgment in favor of the defendants, merely securing to them the exercise of the public rights existing in navigable waters, based upon findings that the land in question is covered by navigable waters and that the defendants are citizens, is not an adjudication against the plaintiff's title to the soil of the property granted, notwithstanding such title was tech-

nically put in issue by the pleadings, and the court found thereon adversely to the plaintiff. Such issue and the finding thereon were immaterial, and the finding, although erroneous, is not binding on the plaintiff, and does not warrant a reversal of the judgment.

ID.—DEFENDANT MAY SET UP RIGHT TO NAVIGABLE WATERS—PRIVATE INJURY NOT ESSENTIAL.—A person against whom an action is begun to enjoin him from using navigable waters, or other public way, may defend by asserting his public right to do so. He need not, in such a case, show private injury either to person or property.

ID.—HUNTING WILD GAME AN INCIDENT TO RIGHT OF NAVIGATION.—The hunting of wild game, although not designated by the authorities as an object for the protection and promotion of which the state holds title to and dominion over the tide lands and navigable waters, nevertheless is a privilege which is incidental to the public right of navigation; and any persons, having the right of navigation over such waters, may exercise that right at will as a public right, and if, in doing so, they find game birds thereon, they may, during the lawful season, shoot and take them.

APPEAL from a judgment of the Superior Court of Napa County and from an order refusing a new trial. Henry C. Gesford, Judge.

The facts are stated in the opinion of the court.

Bell, Straus & Atwood, and Frank V. Bell, for Appellant.

Raymond Benjamin, and Frank L. Coombs, for Respondents.

SHAW, J.—Appeals taken from the judgment and from an order denying a new trial in an action to enjoin trespasses upon and injuries to land alleged to belong to the plaintiff.

The plaintiff claims ownership in fee of 302 acres of land which at ordinary high tide is covered with water and is known as "Fly's Bay." The defendants are residents and citizens of the state. They deny that the plaintiff is the owner of the land, but do not claim ownership in themselves. Their sole affirmative claim is that as citizens of the state they have the right to go upon the premises for the purposes of hunting, fishing, and navigation. They assert that Fly's Bay is a side channel of the Napa River and is a navigable stream or channel and as such belongs to the public, so far as may be necessary for the purposes stated. The

plaintiff claims title from the state of California, under a sale of the land as tide land made by the state to him on January 15, 1906. The action was begun on January 26, 1906. Afterward, on March 4, 1907, in pursuance of said sale, a patent was issued to him by the state.

The court below found that the plaintiff is not the owner or entitled to the possession of the premises; that they belong to the state of California; that the "so-called property . . . consists of a navigable bay commonly known as 'Fly's Bay,' which said bay is a portion of and opens into and at its northern and southern boundaries is connected with the Napa River . . . one of the navigable streams within the county of Napa;" and that at mean tide the whole of the premises is a large body of navigable water which for many years has been and now is used by vessels of small burden for purposes of navigation. Judgment was thereupon given that each defendant is entitled to the privileges, use, possession, and enjoyment of the waters of Fly's Bay for navigation, for fishing, and for hunting wild game thereon, and that plaintiff take nothing by his action.

The evidence concerning the survey under which the plaintiff obtained his patent, shows that the tracts surrounding Fly's Bay had been previously sold as tide lands, or as swamp lands, and that the surveys thereof had been made by meandering Fly's Bay and making its banks the boundaries of those tracts. In surveying for the plaintiff, the distances across the channel at the northern end of the bay and across the bay at the southern line of the tract, and across Mud Slough on the easterly line, were ascertained by triangulation. The southern end was more than a quarter of a mile wide. The remaining lines were not surveyed, but were ascertained by verifying the surveys of the surrounding tracts and practically adopting the lines thereof next to the bay as the lines of the plaintiff's tract. There is ample evidence to show that through this bay and extending at each end into Napa River, there is a channel deep enough for navigation at mean tide which has been used for many years and is now used for navigation by the public. There is evidence also that practically the whole area included within the boundaries of the patent is navigable for small boats at ordinary high tide. It does not appear that there has ever

been any occasion for running boats out of the main channels, except for the purpose of hunting. At low tide the land is nearly all bare, except the channel aforesaid. The finding that Fly's Bay is navigable water is supported by sufficient evidence.

The issuance of the patent is admitted. If it conveys to the plaintiff the unqualified fee in the entire area, the findings and judgment are unquestionably wrong. If it conveys the title to the soil, subject to the public easement for purposes of navigation and fishery, the finding that the plaintiff has no title at all is without support, but the judgment refusing an injunction and declaring the defendants entitled to the privileges of the bay for navigation and fishery, is not erroneous in any substantial respect. The latter proposition presents the principal question for consideration.

The defendants, in their presentation of the case to this court, admit that the patent was valid and effectual to convey to the plaintiff the title to the soil underlying the waters of the bay and to give him complete title to the premises, except so far as they may be necessary to the public uses of navigation and fishery. With the exercise of these public rights, they contend, the plaintiff cannot interfere. They further say that if a citizen has the right to navigate the water in a boat, he may go at will, for any purpose or without purpose, and that if he finds game birds thereon he may shoot them and take them for his own use without infringing any right of the plaintiff as the subordinate owner of the soil. The defendants further concede that they have no private rights in the premises, nor any such privity with the state as would be necessary to authorize them to attack the validity of the patent except so far as it is absolutely void as matter of law. The decision in *Gale v. Best*, 78 Cal. 235, [12 Am. St. Rep. 44, 20 Pac. 550], and other similiar cases, would preclude them from making such attack as mere citizens claiming public rights alone. Their theory is that they are not attacking the patent at all, but that it is qualified and limited by the law and by certain provisions of the statute and the constitution which enter into and become part of it, and that they are seeking only to have it limited to its true effect and to claim and maintain the privileges which, as thus qualified, it preserves to them.

So far as may be necessary for the regulation of interstate and foreign commerce, the United States has the paramount right to control the navigable waters within the several states. The state can make no disposition of the soil beneath, or allow any interference with the navigable waters, that will impair this right and power of the United States. The title to the soil beneath such waters including all that is covered with water at ordinary high tide, as well as that lying below low tide, belongs to the respective states by virtue of their sovereignty. "It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein freed from the obstruction or interference of private parties." . . . "The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." . . . "It is grants of parcels of lands under navigable waters, that may afford the foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels, which being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state." (*Illinois C. Ry. v. Illinois*, 146 U. S. 435, 452, [36 L. Ed. 1018, 13 Sup. Ct. Rep. 110].) Similiar statements concerning this subject have been made by this court. (*Eldridge v. Cowell*, 4 Cal. 87; *Ward v. Mulford*, 32 Cal. 372; *Oakland W. F. Co. v. Oakland*, 118 Cal. 183, [50 Pac. 277]; *People v. Kerber*, 152 Cal. 733, [125 Am. St. Rep. 93, 93 Pac. 878].)

Since the defendants concede the validity of the patent and that the title to the soil passed thereby, and claim only the public rights aforesaid, and as the question of the validity and effect of such patents, as affecting the right of the state to vacate them or retake the lands, is involved in other cases

now pending before this court, we need not determine whether or not the sale passed the title to the soil to the plaintiff, but, for the purposes of the case, we will assume that it is valid and effectual to that extent.

The defendants further concede the soundness of the decision in *Eldridge v. Cowell*, 4 Cal. 87, to the effect that the state has power to establish a harbor line, or seawall, in furtherance of navigation, and to fix it at such a distance from the shore that some of the intervening lands lie so far from the seawall that they cannot be conveniently or practically applied to any use in aid of navigation or of commerce between land and water, and that, having done so, the public easement over such land is destroyed, and the state may then sell it to private persons to be filled in and applied to other purposes. This proposition has been affirmed, recognized, or conceded in other cases in addition to those above cited. (*Holladay v. Frisbie*, 15 Cal. 635; *San Francisco v. Straut*, 84 Cal. 124, [24 Pac. 814]; *Wheeler v. Miller*, 16 Cal. 124; *Knight v. Haight*, 51 Cal. 171; *Friedman v. Nelson*, 53 Cal. 589; *Seabury v. Archur*, 28 Cal. 142; *Knight v. Roche*, 56 Cal. 21; *Le Roy v. Dunkerly*, 54 Cal. 459; *People v. Davidson*, 30 Cal. 384; *People v. Klumpke*, 41 Cal. 277; *Hyman v. Read*, 13 Cal. 444. See, also, *United States v. Mission R. Co.*, 189 U. S. 405, [47 L. Ed. 865, 23 Sup. Ct. Rep. 606].)

The sale and patent, under which plaintiff claims title, possession, and control of these waters, were made in pursuance of the provisions of the Political Code authorizing the sale of swamp lands, salt marsh, and tide lands, being sections 3440 to 3493½, inclusive. It is admitted that those provisions were regularly pursued. The aforesaid propositions being conceded by the defendants, the soundness of which we need not consider, the only remaining inquiry necessary to the disposition of the case is whether or not the provisions of the Political Code, conceding that they authorize the sale of the soil covered by water at ordinary high tide, go farther and authorize a sale which destroys or vacates the dedication of the water to the public uses of navigation and fishery, or vests in the grantee the right to prevent the public use and convert both land and water to his own private use and possession. We are of the opinion, for reasons

now to be given, that such sale does not vacate the public easement or vest such right in the purchaser.

The decisions above cited, so far as they hold that the state may, in the interest of navigation, destroy the public easement and divert to exclusive private ownership parts of the tide land or submerged land not necessary for navigation and capable of reclamation for other uses, were all cases involving dispositions of lands under statutes adjusting, or authorizing the adjustment of, harbor lines and providing for the sale of lands covered by navigable waters but too far landward of the seawall to be of any use in connection with navigation, statutes which plainly manifested an intent to deal with and terminate the public easement over such lands. They are not authority for the proposition advanced by plaintiff, unless we shall find that the statute under which he purchased manifest a like intent.

The aforesaid provisions of the Political Code do not express or indicate such intent with respect to navigable waters, but, when properly interpreted and applied, show a design to dispose of the tide lands subject to the public easement in any navigable waters included within the tracts so disposed of.

The provisions in question are the result of an evolution in legislation beginning in 1855. The act of 1855 [Stats. 1855, p. 189] provided only for the sale and reclamation of the swamp and overflowed lands granted to the state by the United States by the act of Congress of September 28, 1850. (U. S. Stats. [9 Stats. 519].) The state held these lands free from any public use. This act of 1855 was repealed by the act of 1858, [Stats. 1858, p. 198], which substantially re-enacted the provisions of the former act. Its title was "An act to provide for the sale and reclamation of the swamp and overflowed lands of this state." It was perceived, however, that in many places the swamp land was contiguous to tide lands, that they were similar in character and appearance, that it was often difficult or impossible to accurately locate the lines of separation, and, indeed, that such line might change temporarily in times of flood. In view of these conditions the statute provided that if, upon the survey of any land sold under the act, a survey which the purchaser was to have made, any portion should prove to be land be-

longing to the state by virtue of her sovereignty, the money paid therefor should be paid into the general fund of the state, instead of the swamp land fund. (Stats. 1858, p. 198.) An amendment, not important here, was made in 1859. (Stats. 1859, p. 340.) The act of May 13, 1861, provided for the reclamation and segregation of the swamp and overflowed lands of the state, and for the sale thereof, after segregation. The swamp and overflowed lands were to be segregated from the "high lands," that is, from lands belonging to the United States, and maps were to be made thereof. Section 27 provided that the act should also apply to salt marsh and tide lands. (Stats. 1861, p. 355.) Unimportant amendments were passed in 1862 and 1863. (Stats. 1862, p. 197; Stats. 1863, p. 523.) A complete revisory act concerning the sales of swamp lands, marsh lands, tide lands and other lands of the state was enacted April 27, 1863. (Stats. 1863, pp. 591-601.) In 1864 and 1866 some amendments were enacted. All these statutes were expressly repealed by the general statute of 1868. (Stats. 1867-8, p. 507.) It was substantially a revision of the previous laws on the subject. It established a state land office to manage the sale of all lands held by the state and the reclamation thereof where necessary. So far as the question here under consideration is concerned, it is not materially different from the provisions of the Political Code on the same subjects.

Neither in the Political Code nor in any of the previous statutes above mentioned, is there any provision for the protection or management of navigable waters, or for the regulation of navigation. No provision is made for the consideration of the subject of navigation or for a decision of the question whether any tide lands are or are not required therefor, or whether the public right of navigation over any given parcel of the soil may be discontinued and the dedication of the soil to the public use revoked or vacated without detriment to the general welfare. The scheme is manifestly designed, not as an exercise of the sovereign power of dominion over these lands for the preservation and protection of the right of navigation, or of the duty of the state to promote, control, and regulate it, but as a plan to dispose of the soil of the tide lands in such a manner that the grantee shall take it for reclamation and cultivation subject to the public rights

wherever they may exist over such lands. It would follow, therefore, that sale under these laws authorizes no destruction of any public easement and that whenever a navigable channel or navigable water may extend over any tide land granted by the state under these statutes, the public right of navigation therein is not destroyed, the purchaser takes subject thereto, and he has no right to enjoin or prevent any citizen from exercising the public rights incident thereto.

If this was true of these statutes originally, because of the nature of the state's title to the land and its duty to protect and preserve navigation, there can be no doubt that it is true since the adoption of the constitution of 1879. Apparently for the purpose of settling this question, section 2 of article XV provides that no one "claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this state shall be always attainable for the people thereof." The legislature is without power to dispose of the tide lands of the state in a manner which would conflict with this provision of the constitution, or to provide for the alienation of a greater estate in such lands than that provision would permit. The provision is that no person possessing tidal lands of a bay, estuary, or other navigable water, whether the possession be lawful or unlawful, can be permitted to obstruct the free navigation thereof. The power of the legislature is limited by the provisions of the constitution, which are mandatory and prohibitory. Therefore, if it can dispose of, or authorize the disposition of, the underlying soil to private ownership, it cannot thereby authorize the alienee to obstruct the free navigation of such water. The words of the constitution are to be considered as incorporated in the grant or patent the same as if inserted therein. They become a part of it and qualify it so that the estate granted is limited to the permitted uses. All the statutory provisions aforesaid regarding tidal lands must be construed so as to be in harmony with this declaration. An intent to

contravene the constitution will not be imputed to the legislature unless it clearly appears and when it does appear the provision is void. We think it is plain that the provisions for the sale of swamp and overflowed, salt marsh, and tide lands as set forth in the Political Code were not intended to affect or extinguish the public rights in navigable waters. The result is that the grantee of such lands may claim the portions of the land so purchased which are not capable of navigation, but that he must leave the navigable waters open for public use.

The previous decisions of this court confirm these conclusions. *People v. Morrill*, 26 Cal. 336, was an action on behalf of the state to cancel a state patent to Morrill, for land sold to him under the act of May 14, 1861 (Stats. 1861, p. 363), providing that tide lands might be sold under the laws then in force for the sale of swamp and overflowed lands. The act of May 13, 1861, had not then become operative, and the court held that the laws referred to were the acts of 1858 and 1859. (Stats. 1858, p. 198; Stats. 1859, p. 340.) The land patented lay upon the sea beach and extended from the line of high tide seaward beyond the low tide line. It was unfit for cultivation and unsuitable for reclamation. The court declared that the acts of 1858 and 1859 were enacted to encourage the reclamation of lands suitable, when reclaimed, for cultivation, and were intended to apply only to lands susceptible of reclamation, and that they did not authorize the sale of land along the sea beach lying between the high and low tide lines. *Taylor v. Underhill*, 40 Cal. 471, is similar to the case at bar. The land in controversy there was a narrow strip opposite the city of Sacramento, constituting the sloping bank of the Sacramento River, lying between the high tide and the low tide lines. The defendant claimed the right to purchase it from the state under the act of 1868, aforesaid. He had obtained a certificate of purchase from the surveyor-general under that act. The court says: "It could not have been intended in authorizing the sale of swamp and overflowed lands to enable persons to obtain titles to lands under navigable waters, which are incapable of being reclaimed for agricultural purposes, and which could not be utilized without materially interfering with navigation." . . . "Admitting that the

title of the state would pass to the defendant under the patent, it would not authorize him to change the waterfront or obstruct navigation. The state can probably sell the land and authorize the purchaser to extend the waterfront so as to enable him to build upon this land; but it must be done in the interest of commerce, and that must first be determined by the legislature. No such right to obstruct navigation passes to the purchaser under the laws for the sale of swamp and overflowed land." *Kimball v. MacPherson*, 46 Cal. 103, was a land contest referred to the court by the surveyor-general. It arose under the act of 1868 aforesaid. Each party claimed the right to purchase the land as tide land. At low tide it was an exposed sand beach; at ordinary high tide it was covered with water. It was not susceptible of use for agricultural purposes, and was useful only for some purpose in aid of commerce and navigation. The court said: "It was not the intention of the legislature to permit a sand beach on the shore of the ocean, between ordinary high and low water marks, to be converted into private proprietorship under the act of March 28, 1868." . . . "The chief purpose of that act was to reduce into one harmonious system all previous provisions for the sale of overflowed, swamp and tide lands, and other lands belonging to the state, and to provide for the reclamation of the first-named classes." . . . "Nothing short of a very explicit provision to that effect would justify us in holding that the legislature intended to permit the shore of the ocean, between high and low-water mark, to be converted into private ownership." The judgment was that neither claimant was entitled to purchase. *People v. Cowell*, 60 Cal. 400, was a direct action to cancel a certificate of purchase of tide land issued under the act of 1863, above mentioned (Stats. 1863, p. 591). The land was on the shore of Monterey Bay at Santa Cruz, partly below low tide line and the remainder below the ordinary high tide line. The trial court found that it could be reclaimed by dykes, but could be made useful for agriculture only by transporting soil for that purpose, and that the cost of reclamation would greatly exceed its value, when reclaimed, for any purpose of tillage and agriculture. It was argued by the claimant that the mere fact that it would be a bad speculation for such uses was

immaterial, that the only test was, "Is the land reclaimable?" The court held that although reclamation was physically possible, land of that character was not within the terms of the statute, but that said statute applied only to land reclaimable for agricultural purposes, that this was clearly not of that character, and that therefore it was not subject to sale thereunder.

In *People v. Russ*, 132 Cal. 102, [64 Pac. 111], the defendant had bought, under the provisions of the code, a tract bordering on Salt River, a navigable stream in which the water rose and fell with the tide. He had applied to buy the land as marsh and tide land, under said code provisions. Two small sloughs extended through the tract from Salt River to the ocean. These were not navigable, but the tides forced water from the ocean through them into Salt River. This increased the flow of the river to the ocean, and by that means Eel River bar, at the outlet of Salt River and Eel River, was kept sluiced out to a depth which made it navigable and thereby navigation from Salt River to the ocean was made possible. The defendant in reclaiming his land dammed these sloughs so as to prevent this tidal flow through them from the ocean to the river, the effect being that the volume of water in the river was not sufficient to sluice out the bar, and navigation in the river and over the bar was thereby obstructed. The court held that, although the sloughs were not themselves navigable, yet that the filing of them so as to affect injuriously the navigation of the river and bar was unlawful. It said that the right to reclaim the tide lands, under the provision of the code for the sale of such lands, is not superior to the public use of navigable streams. Speaking of the right of the owner to dam the sloughs, it said: "The Swamp and Overflowed Land Act does not purport to give the owner that right, even conceding such a power in the state, and the right of the public in the use of a stream as a public highway, is paramount to any right which the owner of the land has to reclaim his land from overflow." . . . "While the state is pleased to see its swamp and overflowed lands reclaimed, and thereby become productive, yet the constitution of the state declares that no owner of tide lands of any harbor, bay, inlet, estu-

ary or other navigable water in this state, shall be permitted to destroy or obstruct the free navigation of such water.”

All of the foregoing decisions, except the last, concern sales made under the laws enacted prior to the code. As the code does not substantially depart from the provisions previously existing, it is to be presumed that the legislature intended it to be understood as having substantially the same purpose, object, and meaning. Hence it cannot be said that the action of the surveyor-general in receiving the application approving the survey, and preparing the patent, or of the governor in executing it, are to be considered as a determination by the state that the land does not include any navigable water, or as a destruction or discontinuance of the public easement therein, or as an exercise of the functions of the state concerning the control of navigable waters. It seems necessarily to follow that, conceding that the title to the soil passes when tide land is purchased from the state, under the code, the question whether it includes within its bounds any navigable waters, and the extent of such navigable waters, are not determined by the sale, but remain open for further adjustment between the purchaser and the state, and the sale does not vest in the purchaser the right to erect reclamation works which may materially interfere with the navigation of such waters. And the question whether or not there is such navigable water over such land, must in the mean time remain open as a question of fact, and its existence may be shown by any citizen in defense of an action to prevent his exercise of the public right of navigation secured to him by the said constitutional provision.

The decision in *Bolsa Land Co. v. Burdick*, 151 Cal. 254, [12 L. R. A. (N. S.) 275, 90 Pac. 532], and the comments of the court regarding the power of the state to sell tide lands, are based on the conclusion stated in the opinion that the waters there involved were not navigable. While it appeared that some of the land there involved had been obtained from the state by purchase under the code provision for the sale of tide lands, yet it also appears that the land or waters so purchased were all included within the limits of a Mexican grant afterward confirmed by the United States. It is doubtful if the state patent conveyed

any title thereto. There is nothing in the decision which, when applied to the facts upon which it is based, is at all inconsistent with the proposition that the provisions of the Political Code for the sale of swamp lands and tide lands do not authorize the closing of navigable waters by the purchaser and were not intended to affect public easements therein. The effect of the constitutional provision was not mentioned or involved in that case.

It has been said that the right of the United States to control navigable waters and adjust harbor lines in the exercise of its power to regulate interstate and foreign commerce is paramount to any title, dominion, or control of the state over such water. (*Illinois C. Ry. v. Illinois*, 146 U. S. 435, [36 L. Ed. 1018, 13 Sup. Ct. Rep. 110].) Nothing which we have said is intended to apply to this question. It is clear that in the absence of any exercise of such power by the United States, the state has control and management thereof, and its mandates upon the subject are binding upon all persons.

The appellant claims that the title to the soil was transferred to him by the patent, and hence that if the finding that the title is in the state and not in him is an adjudication against him, it is a cloud upon his title of such force and effect as to constitute injurious error for which the judgment must be reversed. As we have shown, the validity of the patent is not involved in this case. The defendants cannot question it. Although it is technically put in issue by the pleadings, the issue is immaterial. The judgment contains nothing on the subject of title, and the finding on title is not necessary to support it. It secured to the defendants nothing but the exercise of the public rights existing in navigable waters. This judgment is supported by the finding that the bay is navigable, and that the defendants are citizens. The findings upon the immaterial issue, even if erroneous, are not binding upon the plaintiff and do not warrant a reversal of the judgment. (*Collins v. Gray*, 154 Cal. 135, [97 Pac. 142].)

A person against whom an action is begun to enjoin him from using navigable water, or other public way, may defend by asserting his public right to do so. He need not, in such a case, show private injury either to person or prop

erty. This is not inconsistent with the well-established rule that if such navigable water or public way is obstructed or closed, a private person cannot maintain an action to remove the obstruction or open the way, or to recover damages thereby caused, or to enjoin a threatened obstruction, unless he can show such private injury.

The authorities do not designate the hunting of wild game as an object for the protection and promotion of which the state holds title to and dominion over the tide lands and navigable waters. Nevertheless it is a privilege which is incidental to the public right of navigation. There is no private property right in wild game. The wild animal or bird, not in captivity nor tamed, becomes the property of him who takes or kills it. Any person has the right to take and kill such wild birds or other game in any place where he may find them. He has no lawful right to trespass on the premises of another for that purpose. But wherever he may lawfully go, he may take and kill such game as he may find there, subject, of course, to the restrictions of the game laws. The defendants, therefore, having the right of navigation over these waters, may exercise that right at will as a public right, and if, in doing so, they find game birds thereon, they may, during the lawful season, shoot and take them. The plaintiff, of course, has an equal right to the same privilege. If the judgment were to be construed as excluding the plaintiff from this privilege or as giving defendants the exclusive privilege of hunting thereon, it would be to that extent erroneous. But it is clear that it was not so intended and should not be given such effect. It is to be understood as a declaration that the defendants, in common with the plaintiff and all other persons, have the privilege of hunting on these waters while exercising the public right of navigation over them. It is, therefore, a correct statement of the rights of the defendants.

The judgment and order are affirmed.

Angellotti, J., Sloss, J., Melvin, J., and Lorigan, J., concurred.

Rehearing denied.

[S. F. No. 6260. In Bank.—October 2, 1912.]

SAN DIEGO AND ARIZONA RAILWAY COMPANY (a Corporation), Petitioner, v. CALIFORNIA STATE BOARD OF EQUALIZATION et al., Respondents.

TAXATION—STATE BOARD OF EQUALIZATION—POWER TO MAKE ASSESSMENTS ENDS WITH DELIVERY OF RECORD TO CONTROLLER—MANDAMUS.—Under the act of April 1, 1911 (Stats. 1911, p. 530), all power of the state board of equalization in the matter of the making of assessments for state purposes and the equalization thereof ends with the final delivery by it of the record of assessments to the state controller, and thereafter a writ of mandate will not lie to compel it to assess the property of a railroad for taxes for the current fiscal year. Such an assessment would be wholly void.

ID.—PRESUMPTION OF DUE PERFORMANCE OF OFFICIAL DUTY—DATE OF DELIVERY OF RECORD OF ASSESSMENTS.—On an application for such writ, in the absence of a showing to the contrary in the petition, it must be presumed that official duty has been regularly performed, and that the state board of equalization finally delivered its record of assessments to the state controller on the day required by the statute.

ID.—VOID ACT NOT COMPELLED BY MANDATE.—A writ of mandate will not issue to compel the performance of an act that will be wholly void, and of no possible benefit to the petitioner.

APPLICATION for a Writ of Mandate directed to the State Board of Equalization.

The facts are stated in the opinion of the court.

L. L. Boone, for Petitioner.

U. S. Webb, Attorney-General, and Raymond Benjamin, Chief Deputy Attorney-General, for Respondents.

THE COURT.—This is an original application to this court, upon notice, for a peremptory writ of mandate to require the defendants, the state board of equalization and the members thereof, to assess as operative property of plaintiff, for taxes for the year 1912, all of its roadbed, rights of way, and rolling stock used by it in the operation of its road between Twenty-sixth and Main streets in the city of San Diego

and the Mexican boundary line, together with certain switches. The notice of application, together with the petition, was filed herein June 24, 1912. The notice stated that the application would be made on July 1, 1912, at which time the application was presented to the court, a demurrer being filed by defendants based on the ground of want of facts to warrant the issuance of the writ prayed for. The matter was ordered submitted upon the demurrer upon briefs to be subsequently filed.

The theory upon which the application was based is that plaintiff railroad company ever since March 1, 1911, has been operating a railroad in this state within the meaning of section 14 of article XIII of our constitution (a new section adopted November 8, 1910), and that the property which it seeks by this proceeding to have assessed by the state board of equalization is operative property, assessable under such section only by such state board for the benefit of the state. Such state board has refused to so assess it on the ground that said railroad company "was not in operation, and is not now in operation," within the meaning of such constitutional provision. If this ground is well based, the property is locally taxable where situated for county and local purposes, and the petition shows that it has been listed for local taxation by the county assessor of San Diego County, and that portions of such property located in National City and Chula Vista have been listed in such cities for taxation.

Section 14 of article XIII of the constitution provides that the legislature shall pass all laws necessary to carry the section into effect, and shall provide for a valuation and assessment of the property enumerated in the section, prescribing the duties of the state board of equalization and any other officers in connection with the administration thereof. In pursuance of this provision, the legislative act for that purpose was adopted, the same having been approved April 1, 1911. (Stats. 1911, p. 530.) It is provided therein substantially as follows: The state board of equalization must assess and levy all such taxes between the first Monday in March and "the third Monday before the first Monday in July" (which this year was Monday, June 10), and must publish on said third Monday before the first Monday in July a notice in a daily newspaper in certain cities, stating that the assess-

ment for state taxes has been completed and that the record of assessments for state taxes will be delivered to the state controller on the first Monday in July, and that any company, etc., dissatisfied with the assessment may apply to the board to have the same corrected in any particular. The board "shall have power at any time on or before the first Monday in July" to make corrections. On the first Monday in July the board, through its secretary, must deliver such record of assessments to the state controller, who shall proceed to collect the same. Such taxes are at once due and payable, and one-half thereof shall be delinquent on the sixth Monday after the first Monday in July and the other half on the first Monday in February next succeeding. There is absolutely nothing in the law that can be held to authorize the board of equalization to make any assessment for state purposes as to plaintiff after it has completed its record of assessments for the year and has delivered the same to the controller for collection, thus parting with all custody and control thereof. We have in mind, of course, the provisions of section 3885 of the Political Code, to the effect that no assessment or act relating to assessment or collection of taxes is illegal on account of informality, nor because the same was not completed within the time required by law and the decisions of this court thereunder, but there is not to be found therein any authority for the proposition that after the assessing officer or board has completed the assessment-roll, and delivered the same as a completed roll, in accordance with law, to the proper collecting officer, parting with all custody and control thereof, that he or it can, in the absence of express authority, change any of the assessments therein or add a new assessment thereto. In *Savings & Loan Society v. San Francisco*, 146 Cal. 673, [80 Pac. 1086], the change was held to be one expressly authorized by the board of supervisors under sections 3679 and 3681 of the Political Code, and it was said that "it must . . . be conceded that the assessor had no power to make any changes in the assessment after he delivered his roll to the board of equalization, unless such changes were authorized by the board of supervisors under sections 3679 and 3681 of the Political Code, or with the written consent of the city and county attorney under section 3881 of the same code." It seems very clear to us that at least with the final delivery of

the record of assessments by the state board of equalization to the state controller, all the power of the board in the matter of the making of assessments for state purposes and the equalization thereof is at an end.

There is nothing in the petition in this case to negative the idea that the state board of equalization complied with the law in the matter of the completion and delivery of the record of assessment to the state controller. In the absence of a showing to the contrary, it must be presumed that official duty has been regularly performed and, consequently, that the state board of equalization finally delivered its record of assessments to the state controller on July 1, 1912, the very day on which plaintiff presented its application for a writ of mandate to this court. If this be so, the state board of equalization has not had, at any time since July 1st, the power to make any assessment for the year 1912 against plaintiff, and any assessment now made by it for the year 1912 would be absolutely void. This matter was not submitted to us for decision until some days after July 1, 1912. What we have said appears to us to be a complete answer to the application, even if, as claimed by plaintiff, the state board should have assessed its property, a matter we have in no way considered and upon which we express no opinion. A writ of mandate will not issue to compel the performance of an act that will be wholly void, and of no possible benefit to the petitioner.

The application for a writ of mandate is denied.

[S. F. No. 5762. In Bank.—October 2, 1912.]

F. P. CUTTING COMPANY, Respondent, v. FRANK B. PETERSON, Appellant.

SALE—REFORMATION—GUARANTY AGAINST PRINTED SELLING PRICES OF ANOTHER MANUFACTURER—ABSENCE OF MISTAKE IN WORDING OF CONTRACT.—A provision in a written contract for the sale and delivery of certain canned goods to be thereafter packed by the seller, guaranteeing the prices therein fixed against the "opening printed prices" for the season of a specified packing company whose selling prices fixed and controlled the market prices of such goods, and whose previous custom had been to announce its opening selling

prices by a printed circular issued to the trade but who omitted to do so for the season in question, may be reformed so as to express the mutual intention of the parties that the guaranty should protect the purchaser against any prices which might be made on such goods by such packing company, whether the prices so fixed by it were printed or announced by other methods. This is so, although there was no mistake between the parties with respect to the words which were inserted in the guaranty provision.

Id.—MUTUAL MISTAKE RENDERING WORDS USED INAPPLICABLE TO EXPRESS INTENT.—The fact that the parties to a contract used the very words which they intended to use is not always sufficient cause for refusing the relief of reformation. There may be no mistake as to the words used or to be used, and at the same time there may have been a mutual mistake as to some other matter of fact, affecting the meaning or application of the words and by reason thereof the contract may not truly express the real intention of both parties, and in that event it may be revised and reformed at the instance of the aggrieved party and enforced accordingly, although the words were carefully chosen.

Id.—MISTAKE IN EXPECTING CERTAIN THING TO HAPPEN IN FUTURE.—The mutual mistake of the parties to such contract consisted in expecting a thing to happen in the future which did not occur, that is, that the packing company referred to would issue its customary printed price list. That led to the insertion of the word "printed" in the guaranty.

Id.—MISTAKE AS TO FUTURE EVENT—DOCTRINE OF REFORMATION APPLICABLE TO.—Relief from the consequences of a mutual mistake is not confined to cases where the mistake was with reference to a past event, or to the present existence of some fact or thing. The doctrine is applicable where both parties by mistake expect a future event to occur and describe the subject matter by words which make the intent clear if the event does happen as expected, but which defeat the real intent if the event does not so happen.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing a new trial. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Devoto & Richardson, for Appellant.

Gerald C. Halsey, for Respondent.

THE COURT.—This action was to recover for the unpaid part of the purchase price of some thousands of cases of

canned tomatoes sold and delivered by plaintiff to defendant. The court instructed the jury to render its verdict for the plaintiff in the amount sued for. This the jury did and from the order denying his motion for a new trial defendant appeals.

Plaintiff is a company engaged in the business of canning fruits and vegetables. Defendant is a wholesale grocer. Plaintiff and defendant entered into a written contract for the sale and delivery of canned tomatoes. These canned tomatoes were "futures," that is to say, they were yet to be packed. The contract fixed the price per dozen for the different qualities sold, and contained the following provision: "The above prices guaranteed against the California Fruit Canners Association opening printed prices for the season of 1908." It was executed on August 12, 1908, which was a short time before the beginning of what was called the season of 1908. It is over this provision of the contract that the whole controversy is waged. The plaintiff sued for a recovery under the prices named in the contract, averring that the association "did not print any opening printed prices for the season of 1908 on said goods." The defendant for answer alleged that it was mutually understood and mutually agreed between the parties to the contract that the prices fixed in the contract were subject to reduction if it became necessary to meet any prices that might be fixed for the goods mentioned in the contract by the association, and that the language "the above prices guaranteed against the California Fruit Canners Association opening printed prices for the season of 1908," was inserted with the mutual intention of the parties that the "guarantee should protect this defendant against any prices which might be made on said goods by said California Fruit Canners Association for said season of 1908."

Upon the trial, after a prolonged effort on the part of the defendant to introduce evidence of mutual mistake under the allegations of the answer, the court stated that the answer was not sufficient as an application for the correction of a mistake and to enforce the contract as revised and corrected, but that, as the defect could be supplied by an amendment, evidence would be taken to ascertain whether or not there had been such mistake in drawing the contract, with a view

to allowing such amendment if the mistake appeared. No objection was made to this course, and the court proceeded to hear the evidence offered on that subject.

At the close of this evidence the plaintiff moved the court to deny the application to amend the answer and for a reformation of the contract, on the ground that no mistake which could be corrected under the principles of equity was shown by the evidence. The court sustained this motion and refused to allow the defendant to amend the answer or to proceed further with the proposed defense.

The contention of the defendant was that the phrase "opening printed prices," in the clause above quoted, did not correctly state the meaning which the parties mutually desired to express; that the idea sought by both parties to be expressed was that the Cutting Company would reduce the prices named in the contract, so as to make the selling prices equal to the opening market prices which the California Fruit Canners Association should fix and declare for the season of 1908, whether the prices so fixed were printed or announced by other methods.

The contention of the plaintiff was that there was no mistake between the parties with respect to the words which were to be inserted in the contract and that they, in effect, selected the very words used as the best expression of their intention, according to their understanding of the conditions at that time. The evidence showed that there was no mistake in the selection of the words and it appears that the court below directed the verdict upon the theory that if the mistake was not with respect to the selection of the words to be used there was no mistake shown within the rule by which courts of equity will reform contracts.

The fact that the parties used the very words which they intended to use is not always sufficient cause for refusing relief of this character. There may be no mistake as to the words used or to be used, and at the same time there may have been a mutual mistake as to some other matter of fact affecting the meaning or application of the words, and by reason thereof the contract may not truly express the real intention of both parties, and in that case it may be revised and reformed at the instance of the aggrieved party and enforced accordingly, although the words were carefully chosen. (Civ.

Code, secs. 3399, 3401, 3402.) We now state the facts shown by the evidence on this subject.

At the time the contract was made and for many years prior thereto the California Fruit Canneries Association had packed so large a part of the canned goods of the state that when it declared its opening prices for such goods all other producers and dealers at once conformed thereto. In other words, that association fixed and controlled the market prices of those goods. It had regularly and habitually in preceding years announced its prices at the opening of the season by printing and distributing generally to the trade a circular containing its established price list for "futures" for that season. The parties to this contract did not personally meet. The contract was negotiated by Mr. Oliphant, a broker, who acted as go-between or mutual agent of the parties, representing the Cutting Company when talking with Peterson and Peterson when talking with the officers of the Cutting Company. The association had not at that time announced or declared its prices for the coming season, but both parties believed and expected that it would do so in a short time and that the announcement would be made in the usual manner, that is, by a printed circular distributed to the trade. When the prices named by the Cutting Company were discussed between Oliphant and Peterson, the latter said he would not agree thereto unless the contract contained a clause guaranteeing him against the opening prices for the season to be thereafter fixed by said association. By this it was meant and understood by both parties that if the association's prices were lower than the prices named in the agreement, then the association's prices should be those upon which the sales under the contract should be made. This requirement of Peterson was communicated to the Cutting Company by Oliphant and that company thereupon agreed that the contract should contain a provision to that effect. The association sometimes made lower prices to particular customers and the Cutting Company insisted that the guaranty should not extend to such special prices, but only to the general prices fixed. This was agreed to by Peterson. Having thus brought the parties to an agreement, Oliphant drew the contract for the purpose of expressing the agreement so made, and to provide for the guaranty required he inserted the clause above quoted and

submitted the contract to both parties. It was satisfactory to both as a correct expression of their intention and each thereupon signed it.

It is apparent from this evidence that the object to be secured by the clause in question was to put Peterson on an equal footing with other dealers in canned tomatoes, in case the association's opening prices, and the general market prices thereby fixed, should be less than those named in the contract. The printing of the price list by the association was wholly immaterial to this purpose, but both parties, assuming that such price list would be printed as usual, and desiring to use language that would exclude occasional or special prices as a standard, accepted the words "opening printed prices," as a good description of the standard intended. The words would clearly have accomplished that purpose, if the event had occurred in the manner each expected it would. When the season opened, however, the event proved that the expectation that there would be a printed announcement of association prices was a mistaken one. There can be no doubt from the evidence that this expectation was entertained by both parties, that the mistake in that respect was mutual, and that by reason thereof the contract failed truly to express the intention of the parties.

The case comes clearly within the sections above cited. Section 3399 declares that when through a "mutual mistake of the parties" a written contract "does not truly express the intention of the parties, it may be revised on the application of the party aggrieved, so as to express that intention." The fact that no word was inserted which the parties did not intend to insert and none omitted which they did intend to insert or supposed had been inserted, does not prevent the application of the rule, nor make it any the less a case of mistake. It was the mutual mistake in expecting a thing to happen in the future which did not occur that led to the insertion of the word "printed." This word, if taken literally in connection with the fact that the price list for that season was not printed, would operate to frustrate the real intent. Section 3401 covers this point precisely. It is as follows: "In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry

what the language of the instrument was intended to be." It was shown that both parties intended the legal consequences of the contract to be that the opening market prices of the season as established by the association should be the prices for which the goods should be sold to Peterson and that the language chosen to effect that object was so chosen because of the mistake as to the manner of announcing such prices. We do not understand that relief from the consequences of a mutual mistake is confined to cases where the mistake was with reference to a past event, or to the present existence of some fact or thing. No sound reason appears why the doctrine should not equally apply where both parties by mistake expect a future event to occur and describe the subject matter by words which make the intent clear if the event does happen as expected, but which defeat the real intent if the event does not happen precisely in the manner expected. We think this case comes clearly within the doctrine.

There was no substantial conflict in the evidence on this subject. The president and secretary of the Cutting Company each testified that the wording of the contract was exactly as he intended it should be and that he intended to guarantee Peterson precisely as the clause provided. There was no contention that they did not intend this, as they understood the facts and conditions and effect of the words used. This was not the essence of the mistake. Neither of them disputed nor denied that he then expected that the opening prices of the association would be printed as usual or that he approved the words in consequence of that erroneous belief and expectation.

If they had declared that they did not then expect that the price list would be printed and that they approved the wording with that idea, it would be a virtual confession that they believed that the guaranty would be nugatory and intended to perpetrate a fraud upon the defendant if a lower price was fixed by the association without printing the price list. The mistake would then come within the class of mistakes described in section 3399 as "a mistake of one party, which the other at the time knew or suspected." The evidence shows that Oliphant informed the Cutting Company's officers that Peterson insisted upon a protection against the possibility of being bound to pay a price higher than the opening prices

fixed for the trade generally by the association. They do not deny this evidence. Hence they would be chargeable with knowledge that Peterson expected that the price list would be printed, and if they did not expect the same thing themselves, the case would come under the second class of mistakes mentioned in the said section. The use of the word "printed," of itself indicates such expectation. The court below should have allowed the defendant to amend his answer and, upon the proof made, should have reformed the contract so as to make it express the real intention of the parties. There was evidence to the effect that the association did fix opening prices for that season for the goods in question, and that they were lower than those named in the agreement, the difference making the amount which Peterson refused to pay for the goods delivered. The matter of the reformation of the contract was therefore an important one to the parties and the judgment is prejudicial to the defendant.

The order is reversed.

[S. F. No. 6346. In Bank.—October 4, 1912.]

ANDREA SBARBORO et al., Petitioners, v. **FRANK C. JORDAN,** as Secretary of State of the State of California, Respondent.

ELECTION—CANDIDATES FOR PRESIDENTIAL ELECTORS—NOMINEES OF REPUBLICAN PARTY—REPUDIATION OF PLATFORM AND CANDIDATES OF NATIONAL PARTY.—Nominees for electors of president and vice-president of the United States to be voted for at the general election of November 5, 1912, who were nominated as such by a properly constituted convention of the "Republican Party," held at the time and place appointed by law therefor, and composed, as required by the act of 1911 (Stats. 1911, Ex. Sess., p. 83), of the so-called "hold-over" state senators belonging to such party and the nominees of such party for state senator and assemblyman throughout the state, selected at the direct primary election of such party held on September 3, 1912, are the proper candidates of such party for that office, and entitled to have their names appear as such on the official ballot to be used at such general election, notwithstanding the convention which nominated them had repudiated the platform and

nominees for president and vice-president of the United States of the National Republican Convention, and had declared its intent to support the national platform and candidates for such offices of a new party known as the Progressive party, and they themselves had been pledged to vote as electors against the nominees of the National Republican party for president and vice-president.

ID.—CONVENTION OF REPUBLICAN PARTY—RIGHT OF MEMBER TO VOTE.—

Assuming the validity of the act of 1911, no qualified member of the convention lost his legal right to participate therein by reason of his attitude or vote on any question coming before the convention, whatever might be his motive therein.

APPLICATION for a Writ of Mandate directed to the Secretary of State of the State of California.

The facts are stated in the opinion of the court.

Clayberg & Rose, Samuel M. Shortridge, Leroy A. Wright, and Walter R. Bacon, for Petitioners.

U. S. Webb, Attorney-General, for Respondent.

THE COURT.—This is an application by A. Sbarboro and twelve others for a writ of mandate requiring the secretary of state to place their names on the general election ticket to be used at the general election on November 5, 1912, as the candidates of the "Republican Party" for electors of president and vice-president of the United States, and to omit from said ticket the names of thirteen other persons who claim to be and whose names have been certified to said secretary of state as the candidates of such Republican Party for such office. The secretary of state, it is alleged, will place the names of such other persons on such ticket as such candidates, instead of the names of these petitioners, unless this court orders otherwise.

The facts upon which petitioners rely are fully set forth in their petition, and the question is whether upon these facts they are entitled to the relief sought.

Under our law for the nomination of candidates for electors of president and vice-president of the United States by political parties (Stats. 1911, Ex. Sess., p. 83), the candidates of any such party at the next election are required to be nominated by a convention composed of the so-called "hold-

over" state senators belonging to such party, and the nominees of such party for state senator and assemblyman throughout the state, selected at the direct primary election of such party held on September 3, 1912. Such a convention of the "Republican Party" was held at the time and place appointed by the law therefor, 114 persons participating therein as members. It is not disputed that all the persons attending said convention and participating as members in its proceedings were entitled under the law to which we have referred to participate therein as members, each of them being either a "hold-over" senator elected as and registered as a member of the "Republican Party," or a nominee of such party for senator or assemblyman. We say this is not disputed, for although it is alleged that of the 114 persons participating as members in said convention, only thirteen were "Republicans" and the remaining 101 were not affiliated with the Republican party, and were mere intruders in the convention, it is subsequently alleged that each of said 114 persons who were nominees for the senate and assembly (being 100 of the 114) were nominated at the primary election held September 3, 1912, as Republicans, and that each had duly made and filed the affidavit required by law in which he stated that the name of his party is the Republican party, and that he intended to affiliate with said Republican party and vote for a majority of the candidates of said party at the next ensuing general election. There is no pretense that the same is not true as to the fourteen "hold-over" senators participating. Each and all of those participating were qualified to participate in the convention as Republicans, so far as any test prescribed by the law is concerned. The sole basis of any claim that 101 of the persons participating as members of said convention were not affiliated with the Republican party and were disqualified from acting as members of the convention, is substantially that as members of such convention they repudiated the action of the convention of the National Republican party held at Chicago in June of this year by adopting a resolution directly and positively repudiating the platform and nominees of such National Republican convention, and declaring it to be their intent and purpose to support the national platform and candidates of a new party known as the Progressive party, and by nominating as candidates for elect-

ors of president and vice-president of the United States, persons pledged in the event of their election to vote for the nominees of said Progressive party for president and vice-president of the United States. Such a resolution was, in fact, adopted by the votes of said 101 members, against the protest of the remaining thirteen members, and by the vote of the same 101 members, thirteen candidates for elector of president and vice-president of the United States were nominated as the candidates of the Republican party for that office, who are pledged to vote against the nominees of the National Republican party for president and vice-president. The thirteen protesting members thereupon organized as a convention, claiming to be the only rightful members of the Republican convention called for by the law, adopted a platform ratifying the platform adopted by the National Republican convention at Chicago, and nominated these petitioners as the Republican candidates for electors of president and vice-president.

No question is raised by this proceeding as to the constitutionality of the statute prescribing the manner of nomination by political parties of candidates for elector of president and vice-president of the United States. The petitioners seek the relief asked by them solely as the alleged nominees of the convention provided for by such statute. They set forth no other alleged source of right or title as candidates of the Republican party for such office, and they do not allege any matter entitling them to oppose the printing on the general election ticket of the names of the other set of nominees of said convention, as the candidates of the Republican party, in the event that they, petitioners, are not the rightful nominees under said statute. For all the purposes of this proceeding, then, the statute must be regarded as being free from objection on the ground of violation of any constitutional provision.

Assuming the statute to be in all respects valid, we are satisfied that the petitioners cannot prevail in this proceeding. There is no ground for holding that any member of the convention lost his legal right to participate therein by reason of his attitude or vote on any question coming before the convention. Each member measured fully up to the statutory requirements for election to the convention and participation in the proceedings thereof, and his legal right to continue

therein as a member to the adjournment of the convention could not be affected by his attitude or vote on any question, whatever might be his motive therein. In this respect, he occupied no different position in principle from that occupied by a delegate to a nominating convention under our old system of nomination of candidates. As to such a convention, we have direct authority in this state, in the case of *Hutchinson v. Brown*, 122 Cal. 189, [42 L. R. A. 232, 54 Pac. 738]. A state covention of the People's party, then a regular political party of this state, had been regularly called and convened for the nomination of candidates of such party for state officers. There were about 160 delegates actually present. By a majority vote a plan of fusion with the Democratic and Silver Republican parties was agreed upon, and Judge James G. Maguire, a Democrat, was nominated as the People's party candidate for governor. Fifty-three delegates protested against this proceeding, and withdrew and at once organized another convention as the real People's party convention and nominated a full state ticket. The majority completed their ticket. Each faction presented its ticket for filing to the secretary of state as the regular People's party ticket, and the question before this court was, which was entitled to be filed as the ticket of the People's party? It was unanimously held that the ticket nominated by the majority of such convention was the regular People's party ticket, and it was said, among other things, Chief Justice Beatty writing the opinion:

"It is conceded that both certificates are regular in form, duly authenticated, and that all the conditions of the statute relative to their presentation have been fully complied with. The only question is, which emanated from the regular and authorized convention of the party.

"Upon this point we are satisfied that the respondent erred in his conclusion. It is clear that the full convention was regularly called and organized, and that only about one-third of its members withdrew after the nomination of Judge Maguire. The withdrawal of a minority of the delegates present did not dissolve the convention or destroy its identity. It remained as before, the people's convention, with full authority to nominate a ticket to be voted for at the election.

“The fact—if it be a fact—that some or all of the delegates who remained were violating pledges or sacrificing party interests in nominating Judge Maguire and adopting the plan of fusion, presents a question with which neither the secretary of state nor the court has the slightest concern. That is a matter to be settled between them and their constituents. *Delegates to political conventions are no doubt trustees in a large sense of the word, but they discharge a trust with which the courts do not meddle. They obey or disobey instructions as they see fit, and the only remedy for their disobedience is the censure of the people expressed at the polls. This is true, at least so far as the ballot law is concerned.* All the filing officer has to determine is whether the certificate offered for his acceptance emanates from the regular convention of the party. It is no concern of his whether the delegates to the convention have nominated members of their own party or of other parties, whether the nominees are there to stay or to be taken down.” (The italics are ours).

The views thus announced are applicable here, and they obviously dispose of petitioners' application. They are not the nominees of the Republican party convention for electors, but are simply the choice of a minority thereof, the thirteen others whose names they seek to prevent respondent from placing on the ticket having been legally nominated by a majority vote of such convention as the candidates of the Republican party of this state for that office.

For the reasons stated, the court from the bench ordered that the application for a writ of mandate be denied.

[L. A. No. 3342. In Bank.—October 18, 1912.]

J. SCOTT ALLEN, Petitioner, v. H. J. LELANDE, County Clerk of the County of Los Angeles, and J. HENRY BAETZ, Respondents.

ELECTION—MEMBER OF ASSEMBLY—LEGISLATURE SOLE JUDGE OF QUALIFICATIONS OF MEMBERS—LAW PROVIDING FOR OFFICIAL BALLOT.— Under section 7 of article IV of the state constitution, the assembly is made the exclusive judge of the qualifications of its members, and the law providing for an official ballot cannot be held to have

changed the intent of the people that such body should be the sole and exclusive judge of the eligibility of those whose election is properly certified.

Id.—MANDAMUS—INELIGIBILITY OF CANDIDATE—STRIKING NAME FROM OFFICIAL BALLOT.—A writ of mandate will not lie to compel the county clerk to strike from the official ballot the name of a candidate for member of the assembly, on the ground that he was ineligible for that office by reason of nonresidence. For the court to undertake to try the question of eligibility, and to deprive the candidate of any chance to be elected, would be to usurp the jurisdiction of the assembly.

APPLICATION for a Writ of Mandate directed to the County Clerk of the County of Los Angeles.

The facts are stated in the opinion of the court.

Milton K. Young, and Theodore Bell, for Petitioner.

John D. Fredericks, District Attorney, for Respondents.

THE COURT.—J. Henry Baetz has been nominated as a Republican candidate for the assembly in the sixty-fifth assembly district. The secretary of state has certified to the county clerk of Los Angeles County that he is the Republican nominee for member of the assembly from said district. It is alleged that he is ineligible for that office by reason of nonresidence. The county clerk has been requested to strike his name from the official ballot as such candidate, and has refused. We are asked to issue a writ of mandate compelling the clerk to comply with that demand. The constitution of the state (art. IV, sec. 7) reads as follows: "Each house shall choose its officers, and judge of the qualifications, elections, and returns of its members." By that article the assembly is made the exclusive judge of the qualifications of its members. The law providing for an official ballot cannot be held to have changed the intent of the people in adopting that constitutional provision that the assembly should be the sole and exclusive judge of the eligibility of those whose election is properly certified. For this court to undertake to try the question of eligibility and to deprive the candidate of any chance to be elected, would simply be to usurp the jurisdiction of the assembly.

The petition is denied.

[L. A. No. 2651. In Bank.—October 18, 1912.]

TITLE INSURANCE AND TRUST COMPANY, Respondent, v. CALIFORNIA DEVELOPMENT COMPANY et al., Defendants. NEW LIVERPOOL SALT COMPANY, Appellant, BOAZ DUNCAN, Intervener and Respondent.

RECEIVER—FORECLOSURE OF MORTGAGE—INSUFFICIENCY OF PROPERTY TO DISCHARGE MORTGAGE DEBT—VALUE OF PROPERTY MUST BE SHOWN. In an action to foreclose a mortgage, the appointment of a receiver on the ground that the mortgaged property is probably insufficient to discharge the mortgage debt is not justified, if the only allegation in that connection is a mere averment, on information and belief, that the "property is probably insufficient to discharge the mortgage debt," without any showing of the value of the property, or of any facts indicating its value.

Id.—RIGHT TO RECEIVER IN ACTION TO FORECLOSE MORTGAGE—IMPAIRMENT OF MORTGAGE SECURITY.—The right of a mortgagee to have a receiver take charge of the mortgaged property *pendente lite* is founded upon the proposition that such action is necessary in order to preserve or protect the interest of the mortgagee. His interest is the lien of his mortgage, and its extent is measured by the amount of the mortgaged debt for which the lien is security. Unless the security for the ultimate payment of the debt is in some way injured or impaired, he cannot be prejudiced.

Id.—DANGER OF MATERIAL INJURY TO MORTGAGED PROPERTY—EFFECT OF INJURY ON VALUE OF PROPERTY.—In order to determine whether a receiver should be appointed *pendente lite* in such action, on the ground that the mortgaged property is in danger of being "materially injured," within the meaning of subdivision 2 of section 564 of the Code of Civil Procedure, it is necessary to consider the relative value of the property after the injury has been inflicted, and the amount of the debt, and a receiver should not be appointed, if the injury, though considerable in extent, will still leave enough of the property remaining intact to be ample security for the debt. Consequently, in applying for a receiver on such ground, the plaintiff must show, not only that the property mortgaged was in danger of material injury, but also that such injury would so depreciate its value that it would not thereafter afford adequate security for the payment of the mortgaged debt.

Id.—INJURY TO PART OF MORTGAGED IRRIGATION SYSTEM.—Where the mortgaged property was of vast extent and consisted of several distinct things, amongst others of an extensive irrigation system, it was an abuse of discretion to appoint a receiver *pendente lite*,

upon a mere showing of danger of material injury to a part of such system of irrigation, where no showing was made as to either the extent, the present condition, or the values of the remaining portions of the mortgaged property.

ID.—EX PARTE APPLICATION FOR RECEIVER—UNDERTAKING BY SURETY COMPANY—APPROVAL BY COURT—EVIDENCE OF AGENT'S AUTHORITY—APPEAL.—In the absence of any evidence to the contrary, it will be presumed on appeal that persons purporting to act as agents of a surety company in the execution of an undertaking given upon the appointment of a receiver, as required by section 566 of the Code of Civil Procedure, and which was accepted and approved by the court, sufficiently established their authority by evidence presented to the trial court.

ID.—UNDERTAKING MUST RUN IN FAVOR OF ALL DEFENDANTS.—The undertaking required to be given by section 566 of the Code of Civil Procedure, if a receiver is appointed upon an *ex parte* application, should run in favor of each defendant in the action, and should be in such form that any defendant would have a right of action thereon if he is damaged by the appointment. If the undertaking given and approved by the court was in favor of only one of the defendants, the appointment of the receiver, so far as the interests of other defendants are concerned, was improperly made.

ID.—NEW UNDERTAKING FILED SUBSEQUENT TO APPOINTMENT OF RECEIVER—VALIDITY OF APPOINTMENT—RATIFICATION OF ORIGINAL UNDERTAKING.—Where the original undertaking given ran in favor of only one of the defendants, a new undertaking subsequently given in pursuance of an order of court, running to all the defendants and ratifying and confirming the original undertaking, operated to make valid the appointment of the receiver from the time of its filing, and to cure any defects in the manner of the execution of the original undertaking.

ID.—REVERSAL OF ORDER APPOINTING RECEIVER—APPEAL BY SINGLE DEFENDANT—EFFECT OF REVERSAL.—The reversal of an order appointing a receiver in an action to foreclose a mortgage against several defendants, upon the appeal of a single defendant who had neither the possession nor the right of possession of any of the mortgaged property, and whose only interest therein was that of a subsequent encumbrancer or holder of some of the bonds secured by the mortgage, did not affect the validity of the order as to the other parties to the action. The effect of the reversal would only inure to the defendant appealing, so as to give it the right of participation in the proceeds of any foreclosure sale in preference to the costs and expenses occasioned by the receivership.

APPEAL from an order of the Superior Court of Imperial County appointing a receiver. Franklin J. Cole, Judge.

The facts are stated in the opinion of the court.

Page, McCutchen & Knight, and Page, McCutchen, Knight & Olney, for Appellant.

O'Melveny, Stevens & Millikin, Lee C. Gates, and Walter K. Fuller, for Plaintiff and Respondent.

J. W. McKinley, for Receiver.

THE COURT.—The appeal is from an order appointing a receiver. It is taken by the New Liverpool Salt Company alone.

The action was begun to foreclose the lien of a mortgage or deed of trust made by the California Development Company, to secure the payment of certain bonds issued by it. The order appointing the receiver was made *ex parte*, and was founded on the complaint and the affidavit of one Henry L. Lyon.

We find it necessary to consider but two objections urged against the regularity of the order: 1. That the court abused its discretion in making the order upon the facts shown; and 2. That the order is void, as to the New Liverpool Salt Company, because it was made *ex parte*, without exacting any undertaking for the protection of that company, as required by section 566 of the Code of Civil Procedure.

1. We think the facts shown, though not sufficiently lacking in merit to make the order void for want of jurisdiction, were of so little force and effect that we must declare the making of the order an abuse of discretion. The plaintiff attempted to show the causes for appointing receivers set forth in subdivision 2 of section 564 of the Code of Civil Procedure. These are: 1. "That the mortgaged property is in danger of being lost, removed, or materially injured"; and 2, "That the property is probably insufficient to discharge the mortgage debt."

The only attempt to establish the second ground mentioned consisted of an allegation in the complaint stating "that as plaintiff is informed and believes and therefore avers, the aforementioned property is probably insufficient to discharge the mortgage debt aforesaid." Neither the value of the prop-

erty, nor any facts indicating its value, are set forth in the complaint or in the affidavit. The decision in *Bank of Woodland v. Stephens*, 144 Cal. 660, [79 Pac. 379], is directly to the point that this is not a sufficient allegation of fact to justify the appointment of a receiver under this clause of the section.

The showing under the first clause is also insufficient. The right of a mortgagee to have a receiver take charge of the mortgaged property during the pendency of the action is founded upon the proposition that such action is necessary in order to preserve or protect the interest of the mortgagee. His only interest is the lien of his mortgage, and its extent is measured by the amount of the debt for which the lien is security. The debt is the substantial thing; unless the security for its ultimate payment is in some way endangered or impaired, he cannot be prejudiced. The purpose of the subdivision in question is to provide the means for his protection against such danger. The second clause, which we have just noticed, is provided to enable him, when his debt is matured, to obtain and apply to its payment the rents, issues, and profits of the property, and it expressly declares that this may be done only when the mortgage is due, and when it appears probable that the property mortgaged is insufficient to pay the debt. The first clause covers different contingencies and dangers, but its purpose is the same—namely, to preserve sufficient of the security to discharge the debt. It covers the contingencies of loss, removal, and material injury. If all the mortgaged property is lost or removed from the jurisdiction the entire security is gone, and the prejudice to the rights of the mortgagee necessarily ensues, for he is entitled to have such property remain accessible, whatever its value and although it may far exceed the mortgage debt. But if the danger is only that it may be “materially injured,” the relative value of the property, after such injury has been inflicted, and the amount of the debt, must be considered in order to determine whether or not the mortgagee’s interests require the court to deprive the mortgagor of his lawful possession of his own property. If the injury though considerable in extent, will still leave enough of the property remaining intact to be ample security for the debt, the court should not interfere. In such a case the mortgagee can suffer no

injury to his interests. It was, therefore, necessary for the plaintiff, in applying for a receiver, to show, not only that the property mortgaged was in danger of material injury, but also that such injury would so depreciate its value that it would not thereafter afford adequate security for the payment of the outstanding bonds.

The complaint shows that the bonds issued and unpaid amount to \$477,920, with interest from July 1, 1908. The mortgaged property is of vast extent. It consists of 318 acres of land in Imperial County on the Colorado River, known as Hanlon's Heading; a large canal, then in course of construction, to carry the water of the Colorado River from said heading to a point in California over fifty miles distant, to be there sold to the Imperial Water Company and others, the said water company taking four hundred thousand acre feet per year at the yearly rate of fifty cents per acre foot; a right to take water from said river and also from Volcano Lake in Mexico to supply such purchasers; practically all of the capital stock of a subsidiary company organized under Mexican laws to hold the property and conduct the necessary operations of the system in Mexico, which said Mexican company also holds title to one hundred thousand acres of land in Mexico; the right to sell the entire capital stock of said Imperial Water Company at \$8.75 a share and appropriate the proceeds to its own use, said company having a capital stock of one hundred thousand shares; also the easements pertaining to said water system, all buildings, structures, tools, and personal property used in connection therewith, and all lands, rights, franchises, and property which the Development Company should thereafter acquire. This mortgage, or deed of trust, was made in 1900. The suit was begun on December 13, 1909. Whether or not the proposed water system had been completed, or how far it has been constructed does not appear except by inference. Nothing is said as to the value of this property, or any part thereof, nor as to the extent of the canal.

The only facts tending to show the danger of material injury were those stated in the affidavit of Lyon. From this it appears that somewhere on the Development Company's canal there is a place called "Sharp's Heading," that the "structures" at that heading "are wooden and are old and

weak; and that there is imminent danger that said structures may be washed out at any time," unless the same are further protected; that "the only way for the protection of said canal and water system" is to put in new and permanent structures and collateral works, all of which would cost more than \$250,000. The affidavit then proceeds as follows:

"That said structures at Sharp's Heading are the only suitable place for the handling or putting of the water of said canal into said irrigation system; that if the same be washed out and destroyed, the irrigation system of said California Development Company would be in a condition that it would be useless and that water could not be supplied to the Imperial Valley for many months because it would take several months to reconstruct the said structures. That there are other points in said system of irrigation works that are of temporary character of construction; that the same are in constant need of repair; that through flood or other natural causes the same are liable to displacement and destruction, and the effect thereof would deprive irrigators of water and residents of domestic water and materially injure the property. That the only way for the protection of said canal and water system is the construction of permanent and new structures costing, with all collaterals, over \$500,000.00."

This shows that the new structures required to make the system secure against washouts would cost five hundred thousand dollars. But it does not state the value of the existing structures, nor the value of the entire system, nor the value of the other property covered by the mortgage, nor how much that value would be reduced if the apprehended washouts and injuries actually occurred. The injuries from washouts would doubtless be substantial both in value and in character. But neither the extent, the present condition, nor the values of the remaining portions of a system of irrigation works which is probably larger than any other in the state, or of the property of the Mexican company, appears, and it may well be that, even with the injuries accomplished, the property remaining will far exceed the amount due on the bonds and will constitute abundant security for the payment thereof. If so, there would be no necessity for the appointment of a receiver to incur additional expense to keep the system in operation. The water users would be interested in having

that done for their protection, but the bondholders, being otherwise fully secured, would have no interest sufficient to justify such action. The decision of such matters is very largely within the discretion of the lower court. This court should be slow to interfere with an exercise thereof. But where the showing of apprehended injury fails to make it appear that the mortgagee's or bondholders' interests and security will be jeopardized, it is a clear abuse of discretion to make such an order.

2. Before the order appointing the receiver was made, the plaintiff, under the direction of the court, procured and filed an undertaking of the United States Fidelity and Guaranty Company in the sum of three thousand dollars, in form as provided in section 566 of the Code of Civil Procedure. This undertaking was dated December 13, 1909, it was signed by Catesby C. Thom, as attorney-in-fact for the Guaranty Company, and it was acknowledged by him, as such, on that day, in Los Angeles County, and was filed on the same day in Imperial County. At the time it was so signed, the amount of the obligation was not inserted therein. Before it was filed the words "three thousand dollars" were inserted in the appropriate place by a person authorized by said Thom to do so, the same being made at the courthouse in Imperial County, in the absence of said Thom. The person who wrote these words presented to the court written evidence of his authority to do so, and thereupon the undertaking was accepted and approved by the court and the order was made appointing the receiver.

These facts do not invalidate the undertaking. We have not before us the power of attorney whereby Thom was made the attorney-in-fact of the Guaranty Company, nor the instrument purporting to authorize the other person, in his absence, to write in the amount. Both were sufficient to satisfy the court below of the validity of the undertaking. As error is not presumed, but must be affirmatively shown in order to warrant a reversal of the action of the lower tribunal, and no such showing is made, the conclusion of the court on these points must stand. It is legally possible that Thom was empowered by the Guaranty Company to substitute another person as agent to write in the words aforesaid and, in the absence of any showing to the contrary, it is to be presumed

that the evidence presented to the court below established this authority.

The undertaking was that the said surety "does hereby undertake and promise to and with the *defendant*, California Development Company," that plaintiff would "pay to *said defendant* all damages it may sustain," etc. It did not purport to run to or in favor of any other defendant. Section 566 of the Code of Civil Procedure, provides as follows: "If a receiver is appointed upon an *ex parte* application, the court, before making the order, must require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking."

The purpose of this clause was to provide security to each defendant for the recovery of any damages he might suffer from the appointment of a receiver procured wrongfully, maliciously, or without sufficient cause. The undertaking should therefore be in such form that any defendant would have a right of action thereon if he is damaged by the appointment. Consequently, the approval of the undertaking running to the California Development Company alone was irregular, and the effect is that the appointment, so far as the interests of the New Liverpool Salt Company are concerned, was improperly made.

It appears that subsequently, on March 24, 1910, this defect in the undertaking was called to the attention of the court below and that thereupon it ordered the plaintiff to procure and file a new undertaking in the same penal sum, running to all the defendants, ratifying and confirming the original undertaking, and providing that the liability on the undertaking last filed should relate back to and cover all damages caused by the appointment from the time it was made. This was immediately done. It is unnecessary to say whether or not this undertaking operated to make the appointment of the receiver valid from the beginning. At all events it would operate to make it valid from the time of the filing of

the second undertaking, and it would also cure any defects in the manner of the execution of the original undertaking.

As the receivership is still pending in the court below and the receiver is, presumably, in charge of the property and operating it for the benefit of the other parties, it is proper to consider the effect of a reversal of the order appointing him when such reversal is upon the appeal of a single defendant. The New Liverpool Salt Company was not a necessary party to the action. The only interest it has, so far as the record shows, is its claim that it has some right or interest in the premises described in the deed of trust, which interest or right is subsequent and subordinate to the lien created by said deed. It is not claimed or suggested that it has either the possession or the right of possession of any of the said property. At the time the action was begun the California Development Company was in possession. A receiver to take charge and control of the property could, therefore, have been appointed without making the Salt Company a party to the action, or giving it any notice thereof. The result of the omission to do so would be that its rights or interests would not be bound for any costs or expenses occasioned by the appointment of the receiver or his proceedings thereunder. If, as appears to be understood, it is a holder of some of the bonds or of a subsequent encumbrance on a part of the property, it would have the right to have such encumbrance or bonds paid out of the proceeds of any foreclosure sale in preference to the costs and expenses occasioned by the receivership. The reversal of the order upon this appeal upon the grounds above mentioned will therefore, not affect its validity as to the other parties to the action, or have any effect upon the proceedings other than as above stated. It will inure only to the benefit of the said Salt Company as its interests may appear.

The order is reversed, in so far as it affects the New Liverpool Salt Company, but not as to the other parties.

Rehearing denied.

[L. A. No. 2750. In Bank—October 18, 1912.]

J. F. GROOVER, Respondent, v. PACIFIC COAST SAVINGS SOCIETY et al., Defendants; CALIFORNIA TITLE INSURANCE AND TRUST COMPANY, Appellant.

BUILDING AND LOAN ASSOCIATION—MORTGAGE LOAN TO STOCKHOLDER—PLEDGE OF SHARES—INSOLVENCY OF ASSOCIATION—CREDIT OF STOCK PAYMENTS ON LOAN.—A stockholder in a building and loan association, who, in consideration of a loan, gives an ordinary promissory note to the association, in which he unconditionally obligates himself to pay in money the amount stipulated therein, with interest at a specified rate, and secures the same by a mortgage and a pledge of his shares of stock in the association, is not entitled, upon the insolvency of the association, to be credited on his mortgage indebtedness with the amount of installments paid by him on account of the purchase price of his stock, or with the amount of any profits earned by the association which are apportionable to such stock, in the absence of any provision in either the note, mortgage, certificate of stock, or by-laws of the association, that warranted the application of such amounts to the credit of the mortgagor on account of his note, or that rendered the transaction, so far as the stock was concerned, anything more than a mere pledge by way of security for the payment of the note.

ID.—PAYMENT OF LOAN BY MATURED STOCK IN EVENT OF SOLVENCY.—The fact that, if the association had continued a solvent concern, and the mortgagor had continued to make payments on account of his stock until it had attained its par value, he would have been able to discharge his mortgage indebtedness with the amount then due him on account of the stock, is immaterial in determining what the mortgage contract was.

ID.—DUAL RELATION OF STOCKHOLDER AND BORROWER—OBLIGATION TO PAY LOAN—RIGHT OF STOCKHOLDERS TO SHARE IN ASSETS.—Under such a contract, the dual relations of stockholder and borrower occupied by a borrowing stockholder of the association are entirely separate and distinct, and the fact that the association becomes insolvent cannot affect the obligation of the borrower so far as the necessity of paying in full the amount of his loan and interest thereon is concerned. Upon such insolvency, the borrowing stockholder must repay to the association at once the amount loaned with interest, and as to stock payments he is to be treated as a nonborrowing member. After the assets are collected and the indebtedness of the association paid, the fund which may remain is to be distributed *pro rata* among all the stockholders on the basis of the amounts

paid by them respectively as dues on their stock, whether they are borrowing or nonborrowing stockholders.

APPEAL from a judgment of the Superior Court of Los Angeles County. W. P. James, Judge.

The facts are stated in the opinion of the court.

Olney, Pringle & Mannon, and Page, McCutchen, Knight & Olney, for Appellant.

C. M. Fickert, for Respondent.

LORIGAN, J.—A rehearing was granted on this appeal after decision in Department. That decision, written by Justice Angellotti and concurred in by Justices Shaw and Sloss, is as follows:

“This action was brought by plaintiff to obtain the delivery up and cancellation of, and the execution of a good and sufficient release of, a promissory note for eight hundred dollars executed March 10, 1899, by plaintiff to defendant Pacific Coast Savings Society, and a mortgage given by plaintiff to said defendant on the same day, to secure payment of said note, as well as all other indebtedness of the mortgagor to the mortgagee. Defendant and appellant California Title Insurance and Trust Company is the assignee of said note and mortgage, as well as the certificate of stock in the Pacific Coast Savings Society mentioned therein, by assignment made January 9, 1909. The appeal by said last named company is from a judgment granting plaintiff the relief asked upon payment by him of \$386.99.

“The case was submitted to the lower court for decision upon an agreed statement of facts, upon which appellant, in addition to claiming that plaintiff was not entitled to the relief asked, moved for relief in accordance with the prayer of its cross-complaint, viz.: that the amount due under the note and mortgage be ascertained, that the same be declared a lien on the mortgaged property, and that the mortgaged property (including the certificate and shares of stock) be sold to pay the same, and attorney fees and costs. This motion was denied.

“The trial court reached its conclusion as to the amount due on the note and mortgage, \$386.99 (which amount plaintiff duly offered to pay appellant long prior to the commencement of his action), by deducting from the amount of principal, \$800, what would be the cash surrender value of plaintiff’s said stock, ‘if computed in accordance with the by-laws (of the Pacific Coast Savings Society), and as appears from the rules of computation as stated on the face of the stock itself’ viz.: \$413.01. The surrender value of such stock is made up, of course, of the installments paid in by the holder on account of the purchase price, and such profits as are allotted to the stock. Whether or not plaintiff was entitled to any credit on his note and mortgage for the amounts paid by him on account of the purchase price of his stock, or for the surrender value thereof, is practically the only question presented by the briefs on this appeal.

“The Pacific Coast Savings Society was incorporated in January, 1891, which was prior to the enactment of the statutes of 1891 relating to building and loan associations, and never elected to continue its existence thereunder. Some of its purposes, as stated in its articles of incorporation, were, generally, to accumulate a fund from contributions of its stockholders, advance payments, proceeds of sale of debentures, and profits from investments; to purchase real estate and erect buildings thereon for its members, and to make loans to its members; to issue and sell first mortgage debenture bonds and to borrow money, and to secure the capital stock to be paid into the treasury on the basis of monthly installments, or otherwise. By its by-laws, various classes of stock were provided for, with only one of which we are here concerned, viz.: ‘class “A,” ordinary installment shares.’ This stock was to be paid for in monthly installments of sixty cents per share, and was payable at its face value, in cash, when the amount paid in and the *pro rata* share of profits in excess of expenses and membership fees and any losses which may occur, equal \$100. Each holder of such stock desiring it was entitled to receive for each share of his stock a loan of \$100 from the society upon proper application therefor, assignment of his stock, and execution of such mortgage on real estate as the directors might deem sufficient security for the loan. The rate of interest on such loans was to be not less than

six per cent, and such premium as might be fixed. There was no provision in the by-laws relative to loans to be made on such stock which would make the relation of the borrowing stockholder and the company in so far as the loan was concerned, in regard to any matter material in this case, anything other than that of borrower and lender of money, whose respective rights and obligations must be determined by the stipulations of the note and mortgage given and accepted upon the making of the loan. In other words, while the by-laws were expressly made a part of the mortgage given by plaintiff, there was nothing in said by-laws to modify or affect the express provisions of both note and mortgage as to the nature and extent of the obligation assumed by the borrower, in so far as any matter material to this case is concerned. The by-laws authorized the directors to issue and sell debenture bonds, and secure the payment of the same with a portion or all of the securities owned by the society. In 1895 \$100,000 of such bonds were issued and sold, appellant being made the trustee to hold the securities furnished for the payment of the amounts due thereon, and in January, 1900, plaintiff's note and mortgage, together with his pledged certificate of stock, were regularly assigned to appellant for the purpose of such security. In February, 1905, in an action brought by the attorney-general of the state, the Pacific Coast Savings Society was regularly adjudged to be insolvent, and trustees in liquidation were appointed. The affairs of said society are still in course of liquidation by the trustees under the direction of the court. The judgment of insolvency, which has become final, forbade the transaction of further business by the society. The debenture bonds secured by the assignment of various mortgages, including plaintiff's, are still unpaid to the extent of \$36,356.70.

“The terms of the note and mortgage given by the plaintiff, constituting the contract between the parties, are such as, in our judgment, to preclude any credit to plaintiff of installments paid by him on account of the purchase price of his stock, or by reason of any profits earned by the society which are apportionable to such stock.

“The note is a simple promissory note for \$800, payable ‘seven years after date,’ with interest at the rate of six per cent per annum payable monthly in advance, the interest

to become part of the principal if not paid, and to bear interest at a specified rate. The only other provisions of the note are those substantially providing that if the monthly interest be not paid within a certain time after it becomes due, or if the monthly installments due upon ten shares of stock of the payee 'pledged as security for the payment' of the note are not paid when due, or if the 'monthly premium due on said loan amounting to the sum of \$4.80 per month' payable monthly in advance is not paid when due, then the whole of said principal sum of \$800 and the interest thereon shall become forthwith due and payable at the option of the holder, and the recital that the note is secured by mortgage bearing even date and the pledge by the mortgagor of ten shares of the capital stock of the mortgagee.

"The mortgage, covering certain land in Los Angeles County, recites that it is made as security for the payment of this note, which is set out in full therein, and also as security for all further advances and other indebtedness of the mortgagor to the mortgagee that may exist, arise or be contracted for, before the satisfaction hereof, not exceeding at any time the sum of \$80, exclusive of interest. It provides that the mortgagor 'as a further security for the payment of said promissory note, and the interest to accumulate thereon, and the said par value of said shares of capital stock, has pledged and he does hereby pledge to said mortgagee all of the aforesaid shares of the capital stock,' and gives the mortgagee the right in case of a foreclosure, or nonpayment of the note, etc., to apply at its option, to such payment, the cash surrender value of said stock, and thereupon become the absolute owner of such stock. The mortgagor promises that he will pay to said mortgagee the par value of said stock in monthly installments of sixty cents per share on the first day of each month until such shares are fully paid by the said payments and the dividends and accumulations thereon, and further 'to pay the monthly premium of \$4.80 on said loan on the first day of each and every month during the continuance thereof.' It is further provided that 'all covenants by the mortgagor are intended to run to the mortgagee, its successors and assigns.'

"There is absolutely nothing in note, mortgage or by-laws or in plaintiff's certificate of stock, which certainly compre-

hend all of the written contract entered into by the parties, that warrants the conclusion that payments of installments on account of the purchase price of the stock may, under any circumstances, be applied to the credit of the plaintiff on account of his note, or that the transactions so far as the stock was concerned was anything more than a mere pledge by way of security for the payment of the note, to which the mortgagee might resort 'at its option' in the enforcement of plaintiff's obligation. The features which in some cases involving contracts between building and loan associations and borrowing members have been held to show that the arrangement between the parties was nothing more nor less than the advancement by the association of the par value of the borrower's stock, upon the undertaking of the borrower properly secured, that he would pay not only interest thereon, but also installments on the purchase price of his stock until such time as, by reason of such payment and the profits thereon, such stock becomes fully paid for, when by reason of such payments the indebtedness is to be considered discharged and the stock canceled, are absent from the transaction here involved, so far as the same is evidenced by the writings constituting the contract between the parties. By the terms of that contract, plaintiff was bound to pay in money the amount stipulated in the note, with interest at the rate of six per cent per annum, and payments on account of his stock were not and cannot now be held to have been payments on account of his indebtedness. The fact that, if the society had continued a solvent concern and he had continued to make payments on account of his stock until the same had attained its par value of \$100 per share, he would have been able to discharge his indebtedness with the amount then due him on account of the stock, is of no consequence in determining what the contract between these parties was.

"The distinction between this case and that of *Hale v. Barker*, 129 Cal. 419, [62 Pac. 168], so far as the stipulations of the agreement between the parties are concerned, is very marked, and it was expressly recognized by the learned writer of the opinion in that case that it is impossible to lay down any 'hard and fast' rule that shall apply in all cases, 'not only because of the difference in the mode and rules of business adopted by different associations, but because of the

different conditions inserted in mortgages and the varying allegations in complaints.' In that case, according to the opinion, Barker, the borrower, applied for the advancement of \$1500 by way of loan or anticipation of the value of his shares at their maturity, the bond given by him recited that the loan was 'an advancement to him by said association of one thousand five hundred dollars, by way of anticipation of the value at their maturity, of thirty shares of the capital stock of said association, now owned by said John A. Barker,' and the mortgage purported to secure the continued monthly payment of the interest on the \$1500, and the monthly dues on the stock, until it matured and should be of the value of \$100 per share, and also the surrender of said stock at its maturity in payment of said advancement and the premium bid. The court said that it was part of the contract between the mortgagor and the association that when the stock should be fully paid up and of the value of \$100 per share, the mortgagor should surrender the stock to the association in full payment and discharge of the mortgage. The association having become insolvent, it was said that the 'contract as to the time and manner in which the mortgage was, by its terms, to be satisfied became impossible of fulfillment.' By reason of the insolvency, it was impossible for the association to continue business and bring the stock to its par value of \$100 per share, and therefore impossible to complete the scheme established by the contract, of discharge of the indebtedness by a surrender of the fully paid up shares of stock. Of course, that situation does not exist in this case, for no such scheme is established by the terms of the contract. As put by appellant, 'the only connection here between the note and mortgage, and the stock is that the stock is assigned as collateral security, with the usual covenant on the part of the borrower that he will keep the collateral good.' Assuming *Hale v. Barker*, to have been correctly decided, in view of the particular contract there involved, we do not think that it warrants a similar decision upon the contract presented in this case.

"The dual relation to a building and loan association occupied by a borrowing stockholder, and the fact that payments made by him on account of his stock are not payments on account of his debt are fully recognized by two decisions of

this court in Bank, each more recent than *Hale v. Barker*, a Department case. In *Henry v. Continental Building & Loan Association*, 156 Cal. 667, [105 Pac. 960], where the terms of the note were substantially the same as in the case at bar, the court held that the lower court erred in allowing as credits on the note payments which the agreement into which plaintiffs entered expressly provided should be exclusively applied to the payment of the premium and to the extinguishment of the obligation arising by reason of the purchase of the shares of stock required to be bought as a prerequisite to the exercise by plaintiff of the privilege of securing the eight hundred dollar loan. It was said, quoting approvingly from *McNamara v. Oakland etc. Assoc.*, 131 Cal. 336, [63 Pac. 670]: 'He (the borrower) occupied the dual relation to the corporation of borrower and stockholder, each of which was distinct from the other. Under the scheme he could not be a borrower without becoming a stockholder, but he could be a stockholder without being a borrower. . . . That the relations of borrower and stockholder are separate and distinct, in associations such as defendant's assignor, seems to be well settled. And it is general law that payments on account of collaterals are not payments on account of the debt they secure; the pledging of shares as collateral security for the payment of a debt is a recognition of the distinct character of the member as a member and a debtor.' It was further said: 'So, in the case at bar, it is clear, from the evidence, that the stock of the respondents had not matured at the time of the commencement of this suit, and consequently the payments made on said stock could not, under the terms of the contract of the parties be lumped with payments for other agreed purposes and the total sum thus produced made to extinguish the principal sum of the note.' (See, also, *McNamara v. Oakland etc. Assoc.*, 131 Cal. 336, [63 Pac. 670].)

"It is true that in neither of the cases just cited had the association become insolvent, with the consequent result that the shares of stock could never mature. But these cases do emphatically hold that the dual relations of stockholder and borrower occupied by a borrowing stockholder under such a contract as we have before us are entirely separate and distinct. It would seem to follow necessarily that, under such

a contract, as we have before us, the fact that the association becomes insolvent cannot affect the obligation of the borrower so far as the necessity of paying in full the amount of his loan and interest thereon is concerned, and the payments made by him on account of the purchase price of the stock cannot be credited as payments made on account of his loan. This is held by the overwhelming weight of authority. The reasoning of the cases so holding appears to us to be unanswerable. As substantially stated in *Curtis v. Granite State etc. Assoc.*, 69 Conn. 6, [61 Am. St. Rep. 17, 36 Atl. 1023], the borrowing stockholder stands in a double relation to the association; he is a member—investor—as well as a borrower. As a member, he is bound to contribute to the losses and expenses of the common enterprise. If the amount of dues paid in by him as a member is credited back to him as a debtor, he will receive in full the amount paid upon his stock, while the other members who have not become borrowers may receive only a small percentage of the amount paid in by them. Where such a company becomes insolvent, nothing remains but to wind it up in such a manner as to do equity to the creditors and between the members themselves. As regards the latter, care should be taken to adjust the burdens equally, and not to throw either upon borrowers or nonborrowers more than their respective shares. 'That result may be reached by requiring the borrower to repay what he actually received with interest. He would then be entitled, after the debts of the corporation are paid, to a *pro rata* dividend with the nonborrower for what he has paid upon his stock. He will thus be obliged to bear his proper share of the losses.' And in *Coltrane v. Blake*, 113 Fed. 785, [51 C. C. A. 457], it was said 'The rule in the United States is that the capital stock of a corporation is impressed with a trust for the payment of the creditors of the corporation (citing cases). Especially is this the case with insolvent corporations. The capital stock of a building and loan association is composed of the subscriptions to it, either by cash or dues. If any part of those dues is diverted from the claims of creditors generally, and used for the benefit of a single stockholder by way of credit on a debt due by him to the corporation, it is a misuse of trust funds, and so unlawful.' (See, also, *Towle v. American etc. Society*, 61 Fed. 446; *Weir v. Granite etc.*

Assoc., 56 N. J. Eq. 234, [38 Atl. 643]; *Taylor v. Clark*, 74 Ark. 220, [85 S. W. 231]; *Hale v. Cairns*, 8 N. D. 145, [73 Am. St. Rep. 746, 44 L. R. A. 261, 77 N. W. 1010]; *Dooling v. Smith*, 89 Ill. App. 26; *Clark v. Lopp*, 80 Mo. App. 542; *Strohen v. Franklin etc. Assoc.*, 115 Pa. St. 273, [8 Atl. 843]; *Rogers v. Hargo*, 92 Tenn. 35, [20 S. W. 430].) While there are some decisions not in accord with this view, we are satisfied that upon the question of the application in payment of the loan of amounts paid on account of stock, the views stated in the opinions cited are clearly correct, at least in cases where the terms of the contract between the borrower and the association are substantially the same as those in the case at bar. As to such a case as this, viz., one where the borrower's mortgage has passed by assignment to one from whom the association has borrowed money and to whom it has transferred members' obligations as security, Mr. Endlich in his work on Building Associations, 2d ed., section 531, says: 'In such cases, . . . , when the society has become insolvent, the right of the outside creditor to be paid speedily requires that the borrowing member pay at once what his mortgage then stands for, to wit: the amount actually received with unpaid interest, without credit for his stock-payments, and that he be relegated to the final distribution of the corporate assets for his dividend upon the latter.'

"In view of what we have said, it is clear that plaintiff was not entitled to have the note and mortgage canceled upon the payment by him of \$386.99."

It is earnestly insisted by respondent on this rehearing that the rule declared and adopted in the foregoing opinion as governing the settlement of the indebtedness of a borrowing stockholder to a building and loan association of which he is a member, is contrary to the decided weight of prevailing American authority. Under this insistence we have given that matter further consideration. It is conceded in the Department decision that there are some authorities which declare a rule different from the one there adopted and it is this line of decisions which counsel for respondent claims announces the more equitable rule to be applied in the adjustment of indebtedness between the borrowing member and the insolvent association and is the one which he further insists is sustained by the decided weight of authority.

The growth of building and loan associations throughout the Union in recent years has been attendant with a vast amount of litigation and the decisions of the courts have not been harmonious with respect to the rule to be applied in settlements between the association and its borrowing members. This diversity has arisen in a large measure through differences in statutory provisions governing the associations in the several states, differences in the rules or by-laws of respective associations and the varied forms of contracts which have been entered into between the association and its members and which have come before the courts for construction. No great difficulty has been experienced in applying an equitable rule of settlement where the questions have arisen between a borrowing member and an association which is solvent. It has arisen principally where the association has become insolvent and in an effort by courts under such circumstances to formulate a rule which may be applied so as to operate equitably as to the creditors and likewise between the borrowing and nonborrowing members of the association. It is well settled by all the authorities that when insolvency intervenes the borrowing members must pay up their mortgage indebtedness to the insolvent association at once, notwithstanding such debts by the contract of loan have not matured. It is to such a situation that the courts in the different states have endeavored to apply a rule which would be equitable under the changed conditions produced through the insolvency, and it is in such an endeavor that the inharmony arose in the decisions. This diversity of opinion resulted in the early formulation and application in different jurisdictions of two general rules referred to in the authorities as the Maryland and Pennsylvania rules respectively; the former so called because laid down by the supreme court of Maryland; the latter because announced by the supreme court of Pennsylvania.

The Maryland rule as early declared in that jurisdiction and which to a limited extent has been applied in other states is that on the insolvency of the association the borrowing member should be charged with the amount loaned him by the association with interest thereon, and credited with all sums paid as dues upon his stock and the premium and interest paid upon his loan. It is this Maryland rule which respond-

ent contends should be applied here and which he insists is sustained by the weight of authority. In support of this claim he cites a line of cases from Maryland of which *Waverly etc. Assoc. v. Buck*, 64 Md. 338, [1 Atl. 561], will alone be particularly mentioned: *Buist v. Bryan*, 44 S. C. 121, [51 Am. St. Rep. 787, 29 L. R. A. 127, 21 S. E. 537]; *Butson v. Home Sav. & Trust Co.*, 129 Iowa, 370, [113 Am. St. Rep. 463, 4 L. R. A. (N. S.) 98, 105 N. W. 645]; *Cook v. Kent*, 105 Mass. 246; *Randall v. Nat'l. Building Assoc.*, 42 Neb. 809, [29 L. R. A. 133, 60 N. W. 1019]; *Building Assoc. v. Tinsley*, 96 Va. 322, [31 S. E. 508]; *Snyder v. Fidelity Sav. Assoc.*, 23 Utah, 291, [64 Pac. 870]; *Interstate S. & L. Soc. v. Cairns*, 16 Wash. 215, [47 Pac. 509]; *Hale v. Stenger*, 22 Wash. 516, [61 Pac. 156]; *Fidelity Sav. Assoc. v. Shea*, 6 Idaho, 405, [55 Pac. 1023]; *Western Sav. Bank v. Houston*, 38 Or. 377, [65 Pac. 611]; *Brownlie v. Russell* (Eng.), H. L. 8 App. Cas. 235.

A number of cases from the federal courts are also cited by respondent, but of these cases it may be said (and this will apply equally to a number cited from said courts by appellant) that they need not be considered, as they follow the decisions of the state courts in applying either rule as it is adopted by the higher courts of the states and as the decisions of these state courts are cited and relied on by either side, the federal cases, therefore, can aid nothing in determining the prevailing rule.

It will be observed on an examination of the authorities cited by respondent from Nebraska, Utah, Washington, Oregon, and Idaho that in none of the cases in those jurisdictions (save *Hall v. Stenger*) was there any question as to what rule should be applied between borrowing members and insolvent associations. The question whether the Maryland rule or the Pennsylvania rule shall be applied can only arise when the association has become insolvent. In these western cases cited the actions were either brought by the association to foreclose mortgages accompanied with assignments of their stock given to the association by borrowing members, or were suits brought by such members seeking a cancellation of their mortgages under a claim that a credit on their loans of the withdrawal value of their stock in the association, but which the association refused to make, was sufficient to satisfy their

indebtedness. In all those cases the association was solvent and as is common to building and loan associations it was provided in the by-laws that a member thereof might at any time upon the payment of his indebtedness to the association surrender his stock and be paid its withdrawal value. The right to have such withdrawal value applied on the loan was the question involved in those cases, the claim of the association being that the borrowing members by forfeiture of their stock through nonpayment of dues or for other reasons, had lost their interest in the stock and hence were not entitled to have such withdrawal value applied on their indebtedness. The courts held that these claims of the association which were directed against the right of ownership of the stock by the borrowing members were untenable and that as the latter had a right according to the by-laws of the association to be paid the withdrawal value of their stock, they were entitled to have it applied in payment on the loan. There was no discussion of the Maryland rule or any other equitable rule to be applied in cases of insolvency of the association. Of course, where the association is solvent and a member who obtains a loan partially secured by an assignment of his stock is accorded under the rules of the association the right of severing his membership therewith at any time on payment of his indebtedness and to be paid the actual value of his stock, there ought to be little room for questioning but that he has the right to have all that he has paid in—at least the dues on his stock—which goes to make up its withdrawal value applied in satisfaction of his loan, and this is all that the cases in the various states referred to decided. But where the association becomes insolvent a different situation is presented. A stockholder may not then withdraw. All that remains to be done is to wind up the affairs of the association. The actual value of its shares cannot be determined until this has been done; its assets collected and its indebtedness paid. Until then it cannot be said that the stock has any withdrawal value. It is to such a situation as this, proceeding from the insolvency of the association, that the courts have endeavored to apply some equitable rule with a view to fairly conserving the rights of creditors of the association and adjusting the rights of its borrowing and nonborrowing members between themselves which has resulted in the formu-

lation of the respective Maryland and Pennsylvania rules, and only cases which involve the insolvency of the association and where one or the other of these views have been considered and applied can be of any value in determining which rule is sustained by the better reasoning and is the one more generally applied. In this view the authorities just referred to as they deal solely with the right of borrowing members in solvent associations can aid nothing in determining that question.

As to the other authorities cited by respondent, they do, as claimed by him, announce and apply the Maryland rule in cases of insolvency, but an examination of those authorities will disclose that the contract of loan was essentially different from that involved in the case at bar. Either the loan was an advancement in anticipation of the value of the member's stock at maturity and was to be satisfied by a surrender of such stock when it matured, or the contract of loan in express terms or the by-laws which were made part of the contract, provided that the monthly payments on the mortgage loan and the monthly payments on the stock assigned as collateral security should be made until the stock matured and that upon such maturity the stock should be surrendered to the association in payment and cancellation of the debt.

In *Buist v. Bryan*, 44 S. C. 121, [51 Am. St. Rep. 787, 29 L. R. A. 157, 21 S. E. 537], the contract of loan provided that interest and dues should be paid until the shares of stock matured and said shares were then to be surrendered to the association in satisfaction of the loan. In *Waverly etc. Assoc. v. Buck*, 64 Md. 338, [1 Atl. 561], and *Buston v. Home Sav. & Trust Co.*, 129 Iowa, 370, [113 Am. St. Rep. 463, 4 L. R. A. (N. S.) 98, 105 N. W. 645], the contracts called for the extinguishment of the loan upon the maturity of the shares of stock. In *Cook v. Kent*, 105 Mass. 246, the contract provided that the borrowing member was to pay dues "until the payment of the dues amounted to the principal sum of the loan." In *Hale v. Stenger*, 22 Wash. 516, [61 Pac. 156], it does not appear what the particular contract was, the court saying that "the loan was made in the usual terms and conditions common to loans by building and loan associations to their subscribers." In *Brownlie v. Russell* (Eng.), H. L. 8 App. Cas. 235, the contract provided that the dues

should be credited on the loan and the House of Lords in that case, while conceding that the contract was clearly to the advantage of borrowing members and hard upon the nonborrowing members, sustained a right to the application of the dues to the payment of the indebtedness because "it was the contract."

It was the existence of these express contractual relations as to the loan and its repayment which doubtless entered as an important factor in inducing the Maryland court to the original announcement of the rule by it and its acceptance in the limited number of jurisdictions which have followed it, the reasoning of the American courts being that as the payment of the mortgage debt was by the contract between the borrowing member and the association to be accomplished only by the maturity of the shares, and this was rendered impossible through the insolvency of the association, the contract between them was abrogated *ab initio*, and that being so abrogated the simple relation of debtor and creditor between the borrowing stockholder and the association existed from the beginning, and the former was entitled accordingly under the rule of partial payments to a credit on his loan for all payments made to the association prior to the insolvency.

But in the case at bar we have no such peculiar contract as was involved in the several cases just referred to. In the case here under consideration there is nothing in the note or mortgage, the certificate of stock assigned as collateral security, or the by-laws of the association which, as is said in the Department decision, comprehended all the written contract between the parties, which provided that the payment of dues on the stock should be applied to the credit of the loan, or that the stock was anything else than a pledge as collateral security for the payment of the amount borrowed. This is clearly pointed out in the Department decision and if it be conceded that the Maryland rule for which respondent contends should prevail, even to the extent that it has been applied to particular contracts such as were under consideration in the cases which adopted or followed it, it certainly is not the more generally prevailing or accepted rule which governs contracts and loans between borrowing members and associations such as is here involved.

While it is contended by appellant that the Maryland rule is *in toto* opposed now to the current of recent authority, we perceive no occasion for determining that matter. The whole subject is discussed and considered in many of the cases presently to be cited. That rule certainly has not been extended so as to apply to a contract such as we have here.

In more recent years as building and loan associations have largely expanded throughout the United States they have become a source of extensive litigation; their objects and purposes have been more plainly understood and the courts in the large field of litigation which they have afforded have had occasion to more thoroughly consider than in earlier years the rights of creditors and the relation of borrowing and non-borrowing members to the association, between themselves when a condition of insolvency, which was never anticipated, has occurred. As a result the great weight and prevailing current of authority is that where insolvency occurs the dual relation which the member occupies to the association—that of stockholder and borrower—should be kept separate and distinct. As a borrower he is required to pay back to the association the amount loaned him, with interest. As a stockholder he has subscribed for capital stock of the association upon which he has agreed to pay monthly dues and has assigned such stock as collateral security for the loan. Under this contract of loan the payment of dues on his stock is not credited as a payment on his loan. Such payment is on his purchase of the stock. In relation to such stock he is a stockholder and not a debtor. Upon the insolvency of the association his contract to make further payments on his stock subscription has ended but his relation as a stockholder continues until the liquidation of the association. What he has paid in on his stock, in common with what has been paid in by the other members, with such other sources of revenue, have gone to make up the capital stock of the association, which is a trust fund for the benefit of the creditors thereof. From this fund the debts of the association must be paid and the value of the shares of the insolvent association will be just what the assets of the association amount to after liquidation, and cannot be ascertained until the debts and losses of the association are paid. As a stockholder the borrowing member is liable for his proportion of such outstanding indebtedness.

Whatever losses are sustained must be borne by all the stockholders, both borrowing and nonborrowing members. If, however, the borrowing stockholders are to have credited on their loans as a payment thereon of the amounts which they have paid in as dues on their stock, such members escape the burden of paying any of the indebtedness or losses of the association. They get back the full benefit of everything they have paid in as a satisfaction toward their loans, while the nonborrowing members who have paid in the same dues bear all the losses and consequently get not only no benefit from the dues which have been paid in by the borrowing members but necessarily, as in every case of insolvency, get less than they actually paid in as their stock dues. To prevent what would thus be obviously unfair, the courts have generally adopted as the equitable rule to be applied in such cases the one early announced by the supreme court of Pennsylvania. Under that rule of settlement the borrowing stockholder of the insolvent association must repay to it at once the amount loaned with interest. Payments of dues on his stock will not be allowed as credits on his loan. As to stock payments he is to be treated as a nonborrowing member. After the assets are collected and the indebtedness of the association paid, the fund which may remain is to be distributed *pro rata* among all the stockholders on the basis of the amounts paid by them respectively as dues on their stock, whether they are borrowing or nonborrowing stockholders. Under this rule the rights of the creditors of the association are protected and the members, both borrowing and nonborrowing, are placed upon an equally equitable footing. In laying down this rule it is said in *Strohen v. Franklin etc. Assoc.*, 115 Pa. St. 273, [8 Atl. 843], (from which decision the rule is known as the Pennsylvania rule): "The insolvency of the company puts an end to its operation as a building association. To a certain extent it also ends the contracts between it and its members, and nothing remains but winding it up in such manner as to do equity to the creditors and between the members themselves. As regards the latter care should be taken to adjust the burden equally and not throw upon either the borrowers or nonborrowers more than their respective shares. This result may be reached by requiring the borrower to pay what he actually received with interest. He should then be entitled, after the

debts are paid, to a *pro rata* dividend with the nonborrower of what he has paid on his stock. He will thus be obliged to bear his proper share of loss. To allow him to credit upon his mortgage his payments on his stock would enable him to escape responsibility for his share of the losses and throw them wholly upon the nonborrowers. In other words, the borrower would escape without loss. It will not do to administer the affairs of an insolvent corporation in this manner." The rule as thus laid down is now generally accepted by the text-writers and in the adjudicated cases as sustained by clear equitable considerations. It is the rule laid down in Endlich on Building Associations, 2d ed., sec. 477, and Thompson on Building Associations, 2d ed., sec. 171, p. 344, where the author declares that the rule laid down in *Buist v. Bryan*, 44 S. C. 121, [51 Am. St. Rep. 787, 29 L. R. A. 127, 21 S. E. 537], (the case principally cited in support of the Maryland rule), is "an exception to the recent trend of authorities," and which he further declares is against allowing dues on the stock to be credited on the loan as an unjust preference. Several cases are cited in the Department decision sustaining this rule in its application to the case at bar which it would be unnecessary to again cite save as an orderly enumeration of the decisions in the several states showing how extensively the rule is being adopted and applied. These authorities are *Southern B. & L. Assoc. v. Anniston L. etc. Assoc.*, 101 Ala. 582, [46 Am. St. Rep. 138, 29 L. R. A. 120, 15 South. 123]; *Taylor v. Clark*, 74 Ark. 220, [85 S. W. 231]; *Curtis v. Granite State etc. Assoc.*, 69 Conn. 6, [61 Am. St. Rep. 17, 36 Atl. 1023]; *Ottensoser v. Scott*, 47 Fla. 276, [110 Am. St. Rep. 137, 4 Ann. Cas. 1076, 66 L. R. A. 346, 37 South. 161]; *Dooling v. Smith*, 89 Ill. App. 26; *Wohlford v. Citizens' Bldg. etc. Assoc.*, 140 Ind. 662, [29 L. R. A. 177, 40 N. E. 694]; *Marion Trust Co. v. Trustees*, 153 Ind. 96, [54 N. E. 444]; *Rogers v. Rains*, 100 Ky. 295, [38 S. W. 483]; *King v. Brewer*, 121 Mich. 343, [80 N. W. 238]; *Clark v. Lopp*, 80 Mo. App. 542; *Gary v. Verity*, 101 Mo. App. 586, [74 S. W. 161]; *Knutson v. N. W. L. Assoc.*, 67 Minn. 201, [64 Am. St. Rep. 410, 69 N. W. 889]; *Weir v. Granite State etc.*, 56 N. J. Eq. 234, [38 Atl. 643]; *Meares v. Duncan*, 123 N. C. 203, [31 S. E. 476]; *Hale v. Cairns*, 8 N. D. 145, [73 Am. St. Rep. 746, 44 L. R. A. 261, 77 N. W. 1010]; *Anselme v. American*

B. & L. Assoc., 63 Neb. 525, [88 N. W. 665]; *Monier v. Clark*, 12 N. M. 118, [75 Pac. 35]; *People v. New York B. & L. Assoc.*, 101 N. Y. App. Div. 484, [92 N. Y. Supp. 62]; *Eversmann v. Schmitt*, 53 Ohio St. 174, [53 Am. St. Rep. 632, 29 L. R. A. 184, 41 N. E. 139]; *Strohen v. Franklin etc. L. Assoc.*, 115 Pa. St. 273, [8 Atl. 843]; *Carpenter v. Richardson*, 101 Tenn. 176, [46 S. W. 452]; *Price v. Kendall*, 14 Tex. Civ. App. 26, [36 S. W. 810]; *Leahy v. National B. & L. Assoc.*, 100 Wis. 555, [69 Am. St. Rep. 945, 76 N. W. 625]; *Young v. Bldg. Assoc.*, 48 W. Va. 512, [38 S. E. 670]; *Building & Loan Assoc. v. McPhilamy & Hawks*, 81 Miss. 61, [95 Am. St. Rep. 454, 59 L. R. A. 743, 32 South. 1001].

All these cases just referred to deal with the rule of settlement to be applied where the association has become insolvent, and, in connection with those cited in the Department opinion, fully sustain the conclusion there reached that respondent was not entitled to have his mortgage debt credited with the dues paid on his stock pledged as collateral security for the loan.

The judgment is reversed and the cause remanded for a new trial.

Angellotti, J., Shaw, J., and Melvin, J., concurred.

Rehearing denied.

[L. A. No. 3090. In Bank.—October 19, 1912.]

In the Matter of the Estate of JAMES N. WOMERSLEY,
Deceased.

WILL—DEVISE—REMAINDER TO HEIRS OF TESTATOR'S FAMILY.—Where a testator named Womersley, whose sole heirs at law were his widow and his surviving brothers and sisters, devises all his real estate to his wife for the period of her natural life, and directs that at her death the property shall be equally divided "among the heirs of the Womersley family," the remainder so devised goes to his brothers and sisters who would be his heirs in the event that he died intestate, to the exclusion of the widow of a deceased brother.

ID.—LATENT AMBIGUITY — CONSTRUCTION — UNCERTAINTY.—Such devise in remainder involves no latent ambiguity, and any uncertainty therein arises upon the face of the will, and is to be construed by taking in view the circumstances under which the will was made, excluding the testator's oral declarations. The uncertainty in such devise is not so great as to avoid it.

APPEAL from a decree of the Superior Court of Orange County distributing the estate of a deceased person. Z. B. West, Judge.

The facts are stated in the opinion of the court.

Williams & Rutan, for Appellant Florence Aimee Blake.

E. E. Keech, for Appellant Emily A. Womersley.

Wm. M. Brown, for Respondent executor and other heirs.

HENSHAW, J.—By his last will James N. Womersley, deceased, devised his real property as follows:

“Secondly, I give and bequeath to my wife Emily A. Womersley, all the real estate I die possessed of, wherever located, for her sole and separate use during the period of her natural life, and direct that at her death the said real property be equally divided among the heirs of the Womersley family, share and share alike, my said wife, Emily A. Womersley, to have all the income from said property during her life.”

The executor of this will filed his final account and a petition for the distribution of the estate showing the ownership by the estate of the real property devised, and showing further that the heirs at law of the deceased were Emily A. Womersley, his widow, John Womersley, and William Womersley, brothers, and Sussana Ray, Maud Catherine Savory, and Minna Clarke, sisters. The petition sought a decree distributing a life estate in the realty to the widow with a remainder over to the brothers and sisters.

Florence Aimee Blake was the widow of Harry E. Womersley, a brother of James N. Womersley. Her husband died some years before the death of James, testator. She filed objections to the distribution prayed for, and sought to share equally with the brothers and sisters under the construction

which she gave to the second clause of the will above quoted. A demurrer to the objections and petition of Florence Aimee Blake was interposed by Emily A. Womersley, the widow. The demurrer was sustained and the court decreed distribution as prayed for in the executor's petition. The whole controversy revolves about the true construction of the second paragraph, and the question is whom did the testator mean by "the heirs of the Womersley family."

There is here no latent ambiguity to be resolved under section 1340 of the Civil Code. The phrase used by the testator undoubtedly requires construction, but if that phrase contain any uncertainty, it is one which arises upon the face of the will, and is to be construed by taking in view the circumstances under which the will was made, excluding the testator's oral declarations. (Civ. Code, sec. 1318.) Those circumstances disclose that deceased was an Englishman, that he with his brothers and sisters inherited from his father, that the brothers and sisters were those above named, and in the event of his intestacy were (with his widow) his sole heirs at law. There seems to be no difficulty in arriving at the intent of the testator from the words expressed in the will. Plainly the words mean that the remainder was left to those of his, the Womersley, family, who would be his heirs in the event that he died intestate. This use of the word "heirs" is not strained, but is a common colloquial use recognized both by lexicographers and law-writers. (Standard Dict., heirs; Words and Phrases, 452; 1 Underhill Wills, p. 498; 14 Cyc. 28.) Appellant, Florence Aimee Blake did not belong to the class thus designated. She would not have been an heir of James N. Womersley had he died intestate.

The contention advanced upon the appeal of the widow that the uncertainty in the second clause of the will is such and so great as to avoid it is, for the reasons already given, untenable.

The decree appealed from is therefore affirmed.

Melvin, J., Lorigan, J., Shaw, J., and Angellotti, J., concurred.

[L. A. No. 2776. In Bank.—October 25, 1912.]

J. T. GORDON, and EMMA J. GORDON, Appellants, v,
COVINA IRRIGATING COMPANY (a Corporation),
Respondent.

WATER—CONSTRUCTION OF CONTRACTS—WATER DELIVERED TO IRRIGATION COMPANY FOR CARRIAGE.—In an action brought to have it determined that the plaintiffs are entitled to be furnished by defendant with water for irrigating purposes upon certain lands, it is held, upon a construction of the evidence, including certain contracts upon which the plaintiffs based their rights, that the defendant was under no obligation to deliver to the plaintiffs, as members of a class designated in such contracts as “old users” of a portion of the water carried in its ditches, any water except such water as might be received by it from them to be carried in its ditches for distribution to them, and that it was not required to furnish to either of the plaintiffs any of its own water acquired for its stockholders and for sale if there was a surplus over the amount required for the stockholders.

ID.—PARTIES IN ACTION TO DETERMINE RIGHTS TO WATER AS BETWEEN MEMBERS OF A PARTICULAR CLASS.—Whether the plaintiffs had acquired any right, as against other members of the class of old users, to be furnished with a greater portion of the old users’ water than they actually delivered to the defendant for carriage in its ditches, could only be determined in an action in which such other old users were joined as parties.

ID.—RIGHT OF WAY FOR WATER DITCH—EASEMENT IN GROSS—COVENANT FOR THE RIGHT TO USE WATER.—In view of all the circumstances appearing in this case it is held that a provision in a deed of a right of way over the lands of the grantor, for use as a water ditch, that the grantor should “have the right to purchase and use the water of said ditch upon the same terms and conditions as the stockholders” of the grantee, created a right that was merely personal to the grantor, and not an appurtenance to any particular land, and that the right did not pass by a transfer of the land over which the ditch was constructed.

APPEALS from judgments of the Superior Court of Los Angeles County and from orders refusing a new trial. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

Ward Chapman, for Appellants.

Anderson & Anderson, for Respondent.

ANGELLOTTI, J.—We have in this case appeals by the plaintiffs (husband and wife) from the judgments and orders denying a new trial in two separate actions, brought to have it determined that the plaintiffs are entitled to be furnished by defendant with water for irrigating purposes upon certain lands. In one action, Emma T. Gordon sought such a determination as to a tract of land described as the North 20½ acres of the W. 24½ acres of the S. W. ¼ of section 25, T. 1 N. R. 10 W., S. B. M., which we shall hereinafter designate as parcel “A.” In the other action J. T. Gordon sought such a determination as to a ten acre tract, being lot 2, section 27 of the same township and range, hereinafter designated parcel “B,” an adjoining eight acre tract in section 23 of the same township and range, hereinafter designated parcel “C,” and a forty-two and one-half-acre tract, originally the property of one J. G. Bower, hereinafter designated parcel “D.” In Mrs. Gordon’s action, the trial court concluded that she was entitled to water from defendant for only nine and twenty-three one hundredths acres of parcel “A,” and as this right had never been denied by defendant and was expressly conceded by the answer, gave judgment that plaintiff take nothing by her action, without prejudice to her right to begin an action against certain other persons (termed “old users”) and this defendant jointly, to assert any right she may claim to water for a greater acreage. In the other action, the court concluded: As to parcel “B,” that Gordon had acquired by prescription the right to water for the southerly three acres only, at the rate of one inch for eight acres measured under four inch pressure; as to parcel “C” that Gordon was entitled to receive water at the same rate for 1.6 acres only; as to parcel “D,” that he was not entitled to receive any water.

As to parcels “A,” “B,” and “C” the alleged rights of plaintiffs are based on certain contracts.

The defendant Covina Irrigating Company was originally named the Azusa Water Development & Irrigation Company, its name having been changed to the Covina Irrigating Company since the execution of the various contracts hereinafter

referred to. It was organized in the early eighties, and is a private mutual water company, its water, under its articles and by-laws, being distributed *pro rata* among its stockholders, only such surplus as is not needed for its stockholders being for sale for the benefit of the company. Prior to its organization, the ordinary flow of the San Gabriel River had been diverted during the irrigating season on both the east and west sides for irrigation purposes. On the east side, some of the water was taken out by an old ditch known as the "public water ditch," and used by a large number of irrigators who were known in subsequent transactions as "old users." None of the land described in the complaints was susceptible of irrigation from this old ditch, but a small portion of parcel "C," the evidence being such as to support a conclusion of 1.6 acres, had been irrigated by means of a lateral ditch connecting therewith. In 1882, J. T. Gordon and many others, being desirous of obtaining water for irrigating purposes from such river, began the construction of a ditch that would run from the river through their lands. Before the completion of this new ditch, the defendant began the construction of a cement ditch to carry water that it was developing by means of a tunnel in the San Gabriel Cañon. The Gordons and probably all who were interested in the new ditch then in process of construction, executed deeds to defendant of a right of way over their lands for such cement ditch, the same to conform as near as possible to the line of the new ditch then being constructed, the grantors being given the right to use such ditch in common with the defendant, for conveying such water as they themselves owned or subsequently acquired, whether from the old public ditch or elsewhere. The cement ditch was completed by defendant in 1885 or early in 1886. About fourteen or fifteen acres of parcel "A," four or five acres of parcel "B" and about 3.5 acres of parcel "C" lie below this cement ditch. Water was at once turned into the ditch, but the evidence is such as to support a conclusion that at no time prior to 1890 was more than nine acres of parcel "A" irrigated, or more than the southerly three acres of parcel "B," or more than 1.6 acres of parcel "C." In June, 1888, a contract was entered into between defendant and some seventy or eighty persons, including the plaintiffs, who had been using water from said river by means of said ditch on

certain lands. This agreement recited that the right of each of these persons to a *pro rata* share of the water flowing in the Azusa water ditch (except 7-24ths) for irrigation and domestic use on their lands (which were described and included all of the parcels "A," "B," and "C"), had been recognized by the water commissioners. The agreement then acknowledged the right of each of these individuals to take from the San Gabriel River "the quantity of water heretofore used by them for irrigation and domestic use in and upon the hereinbefore described lands, the quantity of water so claimed as aforesaid being the quantity distributed to each by the aforesaid water commissioners from the said public ditch for use upon the premises aforesaid." It recited that defendant was willing to allow such persons to run said water through its cement ditch to said lands, and to acknowledge that the quantity agreed to be delivered by it to them "belongs in the whole to" them, as appurtenant to said lands. Defendant agreed to receive at the mouth of its water ditch in San Gabriel Cañon all the water belonging to them, and permit the same to flow through its ditches to its laterals nearest said lands, said persons to there receive it with sufficient pipes or ditches. Said individuals, or old users, as they are generally styled, agreed to deliver at the mouth of said ditch, their *pro rata* share of said waters. Defendant agreed that if such water was so delivered, it would carry and deliver it "in quantities of one miner's inch to each and every eight acres of land," and when there is any water so received, flowing into or through said ditch, would give such old users the preference of use in the proportions hereinbefore stated, "provided always, however, that should the amount of water belonging" to such old users, received at the mouth of the ditch, be less than the *pro rata* share belonging to them which formerly flowed through the Azusa public ditch, then the defendant agreed to deliver such lesser quantity as shall bear the same relation of one to eight acres as the water received bears to the *pro rata* share heretofore distributed to said users from the public ditch. It was stated that the *pro rata* share claimed by each party was "one one hundred and twenty-fifth part of all the waters theretofore flowing in the Azusa public water ditch, less seven twenty-fourths of the whole." Defendant agreed "to receive the aforesaid water and to deliver at all times so long as it

continues to receive such water as herein agreed, one miner's inch to each eight acres of land described herein." The agreement fixed the price to be paid by the users for such service. By a supplemental agreement between the same parties, dated February 13, 1889, it was stipulated that the company would carry out its agreement even if it should develop that one or more of such persons should own and be able to deliver less than one one hundred and twenty-fifth of all the Azusa ditch water less seven twenty-fourths, but that no one shall be entitled to more than one inch of water for each eight acres for which he has turned over to defendant the old user right for water, and that "no water shall be required of" defendant, "nor shall any of said parties have any right under this agreement in excess of the amount of water furnished by such old user to the company."

What was called the "compromise agreement," purporting to be an agreement of all parties claiming the waters of the San Gabriel Cañon, bearing date January 26, 1889, was introduced in evidence. This agreement was not recorded until November 2, 1889. The agreement provided for the division of *all* the waters of such cañon. The parties were as follows: The Azusa Water Company was the party of the first part. The defendant, under its old name, was the party of the second part. The Duarte etc. Co. and The Beardslee etc. Co. (westside companies) were the parties of the third part. The Azusa Land and Water Company, the Azusa Agricultural Water Company, and Kate S. Vosburg and Louise S. Macneil were the parties of the fourth part. Individuals signing the agreement "and known as old users" were the parties of the fifth part. It was agreed that so long as there may be an amount of water equal to the flow of one thousand seven hundred inches, miner's measurement under four-inch pressure, or any lesser amount, at the point of division between the parties of the third part and the other parties, 72-720ths should be taken by defendant, 216-720ths by the parties of the third part, 126-720ths by the parties of the fourth part, and 306-720ths was to be "divided into as many parts as there were acres in the tract hereafter agreed to be known as 'The Azusa Water District,' and taken by parties of the fifth part and by the parties of the first and second parts *pro rata* in proportion to acreage represented

therein by said first, second, and fifth parties." It was stipulated that the first and second parties shall "represent all the acreage and take the water of all lands of the so-called old users who have turned over to such corporation the management and control of the water to which they are entitled." The first, second, and fifth parties agreed on the boundaries of the acreage constituting the tract to be known as the Azusa Water District, the same being set forth. Provision was made for the division among the parties of all water in excess of one thousand seven hundred inches. Provision was made as to the place whence the various parties might take their water, and also for the payment by the several parties of their proportion of the expenses. A committee of nine was provided for, one of whom was to be selected by defendant and two by the fifth parties, to represent all the parties and to have full charge from the source of supply to the point of division with the third parties (the westside users). Neither of the plaintiffs joined in the execution of this agreement or was by name designated as a party thereto. Only nine and twenty-three hundredths acres of parcel "A" (the Mrs. Gordon tract) were included within the boundaries of the district described therein, while some fourteen acres thereof lay below the cement ditch and could be naturally irrigated therefrom. No part of either parcel "B" or parcel "C" was included in such boundaries. About four or five acres of parcel "B" and about three and one-third acres of parcel "C" lay below such ditch and could be irrigated therefrom.

Mr. Gordon made known to defendant his objection to having his lands excluded from the compromise agreement, and a proposed contract was prepared by Mr. Wicks, a large stockholder of defendant, between the Gordons and the parties of the first, second, and fifth parts (the last being the old users) in the compromise agreement, reciting that the Gordons are "old users . . . through the old main ditch," and are entitled to share in the compromise, and stipulating that all of parcels "B" and "C," and an additional six acres more or less in parcel "A," "which can be irrigated from the cement ditch," is entitled to a water right equal to any similar area in said Azusa Water District, and that the Gordons shall be supplied with water from the cement ditch "out of the 306-720ths of the first 1,700 inches, and out of the 226-720ths of the water

above 1,700 inches." This agreement was executed by the defendant, by the Azusa Irrigating Company, and by only nine of the some seventy-five old users who had joined in the execution of the compromise agreement. This contract was delivered by defendant to Mr. Gordon, but there was testimony sufficient to support the conclusion that Mr. Wicks informed the board of directors of defendant, in the presence of Mr. Gordon, "that in order to make the contract effective all the irrigators in the old district would have to sign it, to make it binding on the company."

Ever since the execution of the compromise agreement, the committee of nine provided for therein has had entire charge of the distribution and delivery of water to the various companies, and the trial court found that "the only water permitted by said committee of nine to flow to the defendant for use by old users under contract with the defendant . . . has been water appurtenant to lands and for use upon lands within the boundaries of said Azusa Water District," except that water for 1.6 acres of parcel "C" was permitted to so flow and has been received by defendant. Ever since 1890 from fourteen and one-half to fifteen acres of parcel "A" (the Emma J. Gordon tract) has been under cultivation, and water was delivered to it without objection, on the basis of one-eighth of an inch to the acre, on the theory that it was entitled to a fifteen-acre user water-right under the compromise agreement, from 1890 until the year 1902, when it was cut down to a 923-100ths-acre right. Such water the court finds was received by Mrs. Gordon "not from the stock water of the defendant but from the old user water which was carried by the defendant, and to which the old users under contract with the defendant and owning land within the boundaries of the Azusa Water District were entitled." As to parcel "C" (the eight acre tract), no use of water was required or shown subsequent to the compromise agreement until "some time in 1901 or 1902," when water was delivered for one season to a tenant. There was a conflict of evidence on the proposition whether this was stock or old user water, and the court found that it was "stock water to which the plaintiff was entitled by virtue of stock of defendant company," but that plaintiff at that time demanded old user water therefor. A subsequent demand for old user water for

another season was never complied with. In 1906, Gordon set out this tract in orange trees. His demands for old user water for this tract have never been complied with. As to parcel "B" (the ten acre tract), the evidence was such as to support a conclusion that no water was ever received by Gordon for more than three acres. His demands for a larger portion of "old-user" water repeatedly made since May 12, 1902, have always been denied. These actions were commenced May 10, 1905. In addition to other findings, the court found in response to allegations to that effect made by the answers: 1. That the other parties to the contract of June, 1888, and the contract supplemental thereto were necessary parties to a determination of the questions involved relating to parcel "A," but not as to parcels "B" and "C," and, 2. That the causes of action set forth in the complaints are barred by the provisions of sections 318, 337, and 343 of the Code of Civil Procedure.

It is clear that whatever rights plaintiffs acquired under the contract of June, 1888, and the supplemental contract of February 13, 1889, to receive water for irrigation on parcels "A," "B," and "C," as against defendant, cannot be held to be affected by the so-called compromise agreement dated January 26, 1889. They were not parties to that agreement, and, of course, if they had been given rights by the prior agreements, those rights could not be affected by an agreement to which they were not parties.

Nor can they be held to have acquired any additional right by virtue of such compromise agreement (except as to the 9.23 acres of parcel "A" included in the water district described therein), or the attempted agreement of February 23, 1889, purporting to give them rights under the compromise agreement. As to the compromise agreement, the provision relied on by appellants to the effect that the defendant shall represent all the acreage and take the water of all lands of the so-called old users who have turned over to such corporation the management and control of the water to which they are entitled clearly had reference only to the acreage included in the water district specifically described in such agreement, and the old users on such acreage. The attempted agreement of February 23, 1889, on its face contemplated an execution by all the old users who had signed the compromise agreement.

Its provisions were of such a nature that it could not be effectual as against any of such old users who did not join in its execution. By its express provisions, the additional water to be given to Mrs. Gordon and all of the water to be given to Mr. Gordon was to be taken from the portion allotted by the compromise agreement to the acreage embraced in the water district described therein. So much of their land "as can be irrigated from the cement ditch" was to be added to and made a part of such water district, and thus made entitled to receive water belonging under the compromise agreement solely to the acreage described therein. As we have seen, the evidence was sufficient to support the conclusion that Mr. Gordon was informed that to make the attempted contract effective against defendant, all the irrigators in the old district would have to sign it. But independent of this, the attempted contract was such on its face as to show the necessity for this.

The material question then is as to the rights of the plaintiffs against defendant under the contract of June, 1888, and the supplemental contract of February 13, 1889. We are of the opinion that it must be held, as was practically held by the lower court, that the defendant simply undertook to take such water as might be delivered to it by the so-called old users, and carry it for them through its ditch to their lands, at a prescribed charge, the amount to be furnished any old user, however, not to exceed more than one inch of water for each eight acres of land, or such lesser quantity as shall bear the same relation of one to eight acres as the water received bears to the *pro rata* share theretofore distributed to said users from the public ditch. Practically, the defendant made itself a carrier of their water for the old users, and its liability in that connection to any such user was dependent on receiving water to be carried, from or for him. Whatever uncertainty may exist in the provisions of the contract of June, 1888, on this point is removed by the clear and explicit provision in the supplemental contract that none of said parties "shall . . . have any right under this agreement in excess of the amount of water furnished by such old user to the company." By the agreement, the old users expressly undertook "to deliver" to defendant, at the mouth of the ditch their *pro rata* share of the water, and defendant agreed

that "if the aforesaid water is delivered to them as aforesaid, . . . that they will carry and deliver" it, etc. There was no obligation on the part of defendant to carry or deliver to any of the old users any water except that received for them, and certainly no obligation on its part to furnish to either of plaintiffs any of its own water acquired for its stockholders and for sale if there was a surplus over the amount required for the stockholders.

There can be no doubt as to the purpose of the compromise agreement, so far as the intent to exclude plaintiffs from any participation in the waters of the San Gabriel Cañon, except as to the 9.23 acres of Mrs. Gordon included in the water district described therein, is concerned. This agreement purported to cover *all* the waters of such cañon, and to provide for their division in a specified way, to the exclusion of plaintiffs, except as to said 9.23 acres of Mrs. Gordon. The old users joining in the execution thereof formally declared that the only acreage entitled to any old users' water was that described therein. Plaintiffs had full notice of this claim and of the subsequent acts of the parties under it.

The agents of the parties provided for in such agreement, the committee of nine, at all times thereafter had actual possession of all the waters of the cañon for the purposes of distribution and delivery, and there was enough in the evidence to support the conclusion of the trial court that the only water permitted by said committee to flow to defendant for use by old users, except water for 1.6 acres of parcel "C," has been water for acreage included within the limits of the water district described in such agreement. Whatever may have been the right of the Gordons as against those appropriating to their own use waters in fact belonging to them (the Gordons), if they so did, it would seem to necessarily follow that the Gordons did not deliver to defendant, either personally or by agents, old user water to be carried to their premises (except as to the 9.23 acres of parcel A and the 1.6 acres of parcel C), and that in the absence of such delivery, there is no liability on the part of defendant to deliver to them any of such old user water. As we have seen, the only obligation of defendant under the contracts with plaintiffs was in respect to such old user water, and there was no obligation on its part to furnish any of its own water to them. As

to the excess over 9.23 acres of Mrs. Gordon's land furnished with water from 1890 to 1902, between five and six acres, such water being furnished from the old user water and as water to which she was thought to be entitled under the compromise agreement, it may be that Mrs. Gordon acquired the right to have such supply continued, but we think it very clear that the other old users were necessary parties to the determination of that question, and that the defense of nonjoinder of necessary parties in that regard was properly sustained by the lower court. As already noted, the judgment expressly provided that it was without prejudice to the right of Mrs. Gordon to prosecute another action against the old users referred to in the answer and against the defendant as the distributor of their waters, and to assert and enforce such rights as she may have.

In view of what we have said, it is apparent that the complaint of appellants in regard to the conclusions of the trial court as to parcels "B" and "C," owned by Mr. Gordon, cannot be held well founded.

As to parcel "D," originally the Bower Tract, an altogether different question is presented. The sole claim of Mr. Gordon as to this land is based on the provisions of a deed dated September 10, 1883, executed by James G. Bower, the then owner of such tract, to defendant. By this instrument, Bower, for an expressed consideration of ten dollars, remised, released, and quitclaimed to defendant a right of way over the land of Bower in the N. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of section 26, T. 1 N. R. 10 W., S. B. M. (which included this land), and on a line sufficiently described, for a water ditch of sufficient capacity to convey five thousand inches of water, the same to be so constructed as not to obstruct any roads of Bower, defendant to construct and maintain crossings over said ditch where necessary for Bower's use, and "said first party (Bower) to have the right to purchase and use the water of said ditch upon the same terms and conditions as the stockholders of said corporation." Defendant's ditch has been constructed along the line designated in the deed. Bower conveyed this tract of land to one J. S. Slauson, Slauson to Henry Martz on April 29, 1887, Martz to one George W. McKennon on January 9, 1900, and McKennon to plaintiff, John T. Gordon, on January 9, 1902. All of the deeds were

in the form of grant, bargain, and sale deeds, and conveyed the land "together with the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining," but contain no special reference to any right to water from defendant. The trial court found upon sufficient evidence that no water was ever furnished for irrigation of said land, except that for two seasons, 1890 and 1891, water was delivered to a tenant in possession of said premises, but that the same was delivered to such tenant under and by virtue of stock of defendant company held by the tenant or his lessor, and was not delivered as water to which said land was entitled under the terms of said contract or any contract. It further found that neither the deed executed by Bower to the predecessor in interest of plaintiff, nor any of the mesne conveyances, contained any assignment or grant by Bower of any right held or claimed by Bower to take or use water from said ditch. It also found that only about five acres of said land are below the cement ditch or can be irrigated therefrom. It also found that plaintiff's claim as to this land was barred by the provisions of sections 318, 337, and 343 of the Code of Civil Procedure.

The question in this connection is as to the meaning and effect of the provision that Bower is to "have the right to purchase and use the water of said ditch upon the same terms and conditions as the stockholders of said corporation." The claim of Mr. Gordon is that this created a right appurtenant to the land of Bower over which the ditch was constructed, entitling the owner thereof to purchase and use thereon the waters of this ditch to the extent of the requirements of such land, upon the same terms and conditions as the stockholders of defendant. Defendant, on the other hand, claims that the right created was one personal to Bower, an easement in gross, and that such right did not pass by simple transfer of the land. So far as the record shows, as claimed by defendant, the water of defendant "is not made appurtenant to any land but is distributed to the shareholders in proportion to their stock, and . . . can be used and . . . is used by stockholders upon any land that they may choose, either their own, or upon sale by them to other landowners." Section 2 of article XI of its by-laws is as follows: "All water developed or acquired by this company shall be divided *pro rata* in proportion to

the amount of stock they severally hold amongst the stockholders, provided that if there be a surplus not needed for the stockholders' use, it may be sold for the benefit of the company."

In the light of the facts as to the rights of stockholders of defendant corporation in regard to the water of the company, it is apparent that the provision relied on is very uncertain and indefinite in its terms. The intent to limit the effect of the provision to any particular land is by no means clear. The land in fact owned by Bower in the one hundred and sixty acres constituting the N. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of section 26, T. 1 N. R. 10 W., S. B. M., is not described in the deed, and the "right to purchase and use the water of said ditch" is not, in terms, limited to the land owned by him or to any other particular land. The only prescribed limitation on the right is expressed in the words "upon the same terms and conditions as the stockholders of said corporation." The right is given simply to the "said first party" (James G. Bower). According to the evidence, the right of a stockholder to use water is not appurtenant to any land, but he may change his place of use as he sees fit. According to findings sufficiently supported by the evidence there has been no practical construction by any of the parties in favor of the theory that it was intended to make this right appurtenant to the land. In fact, under such findings, the only practical construction shown was opposed to such theory. For nearly twenty years no one apparently claimed the right to water under this contract, and in the two seasons in which water was furnished for use on this land, it was demanded and received upon stock of the company. In view of all the circumstances, we are of the opinion that the trial court was warranted in concluding, despite the presumption that an easement is to be deemed appurtenant to some other estate whenever it can fairly be construed as such, rather than one in gross, that the right created was one personal to Bower and not an appurtenance to any particular land. If this be true, it admittedly follows that there has been no assignment of the right and that Mr. Gordon acquired no interest therein by reason of the conveyance of the land to him in the year 1902, which was the year when the dispute commenced between plaintiff and defendant as to water-rights. We appreciate the force of the argument

of learned counsel for Mr. Gordon to the effect that treating the provision as one personal to Bower and placing him in the exact position of a stockholder of defendant, by reason of the fact that he did not own any stock there would be no way of determining the proportion of water which he was entitled to purchase. But assuming that no measure of his right in this regard can be found in the deed, we do not think that such fact alone would compel the construction sought by plaintiffs to be given to this provision. It may be that the provision construed as it was by the lower court would be void for uncertainty, and still remain that no other construction might fairly be given to it. But it is suggested by counsel for defendant, that, construing the provision as one personal to Bower, it might reasonably be held that there was a limitation on the amount of water he might purchase, and that he could take only such *amount* as would suffice to irrigate such of his land as lay below the ditch, with the right to make such use of the same as he saw fit. However, it is not necessary to determine as to this.

The judgments and orders appealed from are affirmed.

Sloss, J., Lorigan, J., Melvin, J., and Henshaw, J., concurred.

Mr. Justice Shaw did not participate herein.

[S. F. No. 5817. In Bank.—October 31, 1912.]

E. P. CONNELLY, Appellant, v. CITY AND COUNTY OF SAN FRANCISCO (a Municipal Corporation), Respondent.

TAXATION — MUNICIPAL CORPORATIONS — LEVY FOR UNAUTHORIZED PURPOSE — PAYMENT UNDER PROTEST.—Section 3819 of the Political Code authorizes the recovery of taxes levied by a municipality for an unauthorized purpose, the payment of which was made under protest.

Id.—SAN FRANCISCO CHARTER—UNSOLD BONDS NOT OBLIGATIONS OF CITY — TAX CANNOT BE LEVIED FOR PAYMENT OF.—Under the charter of the city and county of San Francisco only such bonds of the munici-

pality as have been sold or whose sale has been contracted for are considered obligations of the city, and only as to such is provision made to meet such obligations by taxation.

ID.—TAX FOR INTEREST AND REDEMPTION OF UNSOLD BONDS MAY BE RECOVERED.—Under the provisions of such charter, as well as by general law, the municipality is authorized to levy a tax only for those bonds which have so become an obligation of the city. A tax levied for the payment of the interest on and the redemption of bonds which had not been sold or contracted to be sold at the time of the levy is unlawful, and the recovery of the amount paid thereon under protest may be had under the provisions of section 3804 or section 3819 of the Political Code.

ID.—INCONVENIENCE TO CITY.—The fact that the city might be inconvenienced by such a limitation on its taxing powers does not justify a different construction of its charter.

ID.—TAX LAWS MUST BE STRICTLY CONSTRUED.—Any attempt on the part of the state, or of one of its subdivisions, to take the property of an individual for public purposes by way of taxation, must find an express statutory warrant, and all laws having this object are to be construed strictly in favor of the individual as against the state.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

J. P. Langhorne, George W. Lane, and J. Delmore Lederman, for Appellant.

Percy V. Long, City Attorney, Jesse H. Steinhart, Assistant City Attorney, for Respondent.

HENSHAW, J.—This is an action brought under sections 3819 and 3804 of the Political Code to recover from defendant \$1,446.42 taxes paid by property owners under protest, for which verified claims were filed with the board of supervisors seeking a refund. The taxes so paid were levied by the supervisors in the general levy of the city and county of San Francisco for municipal purposes for the fiscal year 1904–05. They were levied for the purpose of raising money wherewith to pay interest on and to provide a redemption fund for certain municipal bonds. The issuance of these bonds had been voted upon favorably at an election called for

that purpose, and upon January 25, 1904, an ordinance was passed ordering their issue. In *Law v. City and County of San Francisco*, 144 Cal. 396, [77 Pac. 104], it was held that bonds for one of the purposes—namely, The Telegraph Hill Improvement, had not been voted by the people. As to these bonds the tax levied for interest and sinking fund is admittedly void. This, however, is a minor consideration. The principal ground of attack is that at the time of the tax levy concededly none of the bonds had been sold or contracted to be sold, and that therefore there then existed no bonded indebtedness legally authorizing such tax levy. The facts are conceded; the conclusion disputed.

The municipality, respondent herein, first contends that the taxes were voluntarily paid and therefore not the subject of an action for recovery. (*Dear v. Varnum*, 80 Cal. 89, [22 Pac. 76].) Further, it is contended that section 3819 of the Political Code limits the right of action to attacks upon the assessment and that in the case at bar the attack is upon the tax levy. This is entirely too narrow a construction to be put upon this provision of the code. (See *Hellman v. City of Los Angeles*, 147 Cal. 653, [82 Pac. 313].) Moreover, the allegations of plaintiff's complaint bring him within the provision of section 3804 of the Political Code. Herein the complaint alleges that the plaintiff's assignors did within one month after their payment of the taxes file with the board of supervisors verified claims and demands for the repayment of the taxes so paid under protest, and that the same has not nor has any part thereof been repaid or refunded. This allegation is not denied, and, additionally, is found by the court to be true.

Respondent's position is thus stated from its brief:

"First. That the fact that a debt was not an existing debt at the time of the tax levy would not constitute an objection to the tax levy itself, since the entire taxation scheme of the city and county of San Francisco is based upon an estimation of debts to be incurred, but not actually incurred at the time of the tax levy.

"Second. That the fact that the bonds might never be sold would not be a proper objection to the tax, because practically the greater part of every tax levy under the charter

of the city and county of San Francisco is designed to meet contemplated expenses which may never be incurred.

“Third. That neither the constitution nor the charter prohibit a tax such as the tax in this case.

“Fourth. That to hold in favor of plaintiff would be to establish a doctrine that would seriously impede the sale of municipal bonds.”

The first three propositions may be considered together. Under the first proposition it is pointed out that a tax levy under the charter of the city and county of San Francisco is to a very large extent anticipatory. The auditor transmits to the supervisors “an estimate of the probable expenditures of the city and county government for the next ensuing year.” (Charter of San Francisco, part 3, chap. 1, sec. 3.) Other provisions are pointed out, all showing that the tax levy to meet the running and operating expenses of the city and county of San Francisco is not to meet existing obligations, but is based upon estimates of future expenses and the levy is to meet such expenses. Respondent’s position in this regard is unquestionably true. True it is that neither the constitution of the state nor the charter in express terms prohibits such a tax as was here levied. It does not follow, however, as declared in respondent’s second proposition that because the greater part of the tax levy under the charter of the city and county of San Francisco is designed to meet contemplated future expenses which may never be incurred, therefore the tax levy for bonds unsold and uncontracted for is valid. While there is no express inhibition in the constitution nor in the charter against the levying of a tax under the indicated circumstances, certain general principles of law forbid it. While it is true that under charter authorization the costs of the municipal government are estimated in advance and taxes levied to meet them, and while it is true in a limited sense that the obligation for which a particular tax is levied may not be incurred, as that the taxes collected for street assessment may be greater than the amount actually expended; even when this results, no injury follows to the taxpayer. The funds are carried over and serve to reduce the general tax levy of the succeeding year. When it comes, however, to the funded indebtedness of the city the law makes special provision in many forms for the payment of

the principal and interest of such obligations. From the beginning to the end, elsewhere, as well as in the charter provisions, such a bonded indebtedness or obligation does not exist and is not recognized as a funded obligation unless the bonds themselves have actually been sold or their sale contracted for. "The debt represented by any bond would not exist or be created until the bond is issued by the company, that is, delivered to a third person for a valuable consideration." (*Merced R. & E. Co. v. Curry*, 157 Cal. 730, [109 Pac. 264]; *Dudley v. Board of Commissioners*, 80 Fed. 672, [26 C. C. A. 82]; see, also, *Clark v. Los Angeles*, 160 Cal. 45, [116 Pac. 722].) While none of the charter provisions bears specifically upon bonds of the character here voted, yet throughout the charter wherever bonds are mentioned only those bonds which have been sold or whose sale has been contracted for are considered obligations of the city, and only as to such is provision made to meet such obligation by taxation. Thus the charter deals elaborately with the issuance of bonds to pay for public improvements, provides how such bonded indebtedness may be voted and incurred, provides that such bonds when issued may be sold from time to time by the supervisors as required, and provides (sec. 12, art. 12) that at the time of the annual tax levy the supervisors shall levy and collect annually a tax sufficient to pay the annual interest on such bonds and also the proper aliquot part of the *indebtedness so incurred*. Again, in section 2 of article 3, the auditor in making up his estimate shall "state the amount required to meet the interest and sinking funds for all *outstanding funded debts*." Article 3, section 2, provides that the general tax levy "exclusive of the state tax and the tax to pay the interest and maintain the sinking funds of the *bonded indebtedness* of the city and county" shall not exceed a given amount. Section 14 of article 3 provides that the supervisors shall from time to time provide "for the payment of the interest and principal of the *bonds for which the city is liable*." Thus, without further citations, it is made certain by the charter provisions, as it is under general law, that only for those bonds which have become an obligation of the city may a tax be levied. Were the construction contended for by respondent to prevail, it might result—and we are advised in this case it has resulted—in grave injustice to the

taxpayer. The city might levy taxes year by year for bond interest and bond redemption and never sell a bond. At the end of each year it might transfer this fund to its general fund and use it for other purposes. At the end of any number of years of such practice, if the bonds eventually should be sold, the taxpayer would still have to pay into the treasury the full amount for interest and redemption. Aside from the hardship to the taxpayer, this would be to countenance a flat though indirect violation of the charter itself. The supervisors might make a general tax levy to the full amount permitted by the charter and by the indirect method of this unauthorized bond tax levy secure from the taxpayer large sums of money for the sole purpose of transferring it to the general fund, and so by indirection defeat the express mandate of the law. Finally, upon this point it may be well to give the language of this court in *Merced County v. Helm*, 102 Cal. 165, [36 Pac. 399]:

“Any attempt on the part of the state, or of the county, as one of the subdivisions of the state, to take the property of an individual for public purposes by way of taxation, *must find an express statutory warrant*, and all laws having this object are to be *construed strictly* in favor of the individual as against the state.”

To the argument of inconvenience advanced by respondent under the fourth head, sufficient answer may be made first, by saying that an inconvenience to the city does not justify the despoiling of its taxpayers, and, second, by reference to *Johnson v. Williams*, 153 Cal. 368, [95 Pac. 655].

For the foregoing reasons the judgment is reversed and the cause remanded.

Shaw, J., Angellotti, J., Lorigan, J., and Melvin, J., concurred.

Rehearing denied.

[S. F. No. 6115. In Bank.—November 6, 1912.]

JOHN E. McDOUGALD, Treasurer of the City and County of San Francisco, Appellant, v. **MARTHA L. LOW** and **JAMES LAIDLAW**, Executors, etc., of Charles Adolphe Low, Deceased et al., Respondents.

ESTATES OF DECEASED PERSONS—RESIDUE OF ESTATE OF TESTATOR.—

The residue of the estate of a person dying testate is that which remains after paying the legacies of the will and the debts and expenses of administration.

Id.—INHERITANCE TAX—NONRESIDENT TESTATOR—PROPERTY SITUATED IN THIS STATE—DETERMINATION OF VALUE OF PROPERTY PASSING IN KIND—NO DEDUCTION FOR FOREIGN DEBTS OR EXPENSES.—In determining the value, for the purpose of fixing the amount of the inheritance tax payable in this state, of property having its *situs* therein which passed in kind to the residuary legatees under the will of a nonresident testator, who left no creditors in this state, and whose estate in the state of his domicile is ample to pay all debts and expenses of its administration, no deduction should be made from the actual value of the property of any portion of the debts proved, or expenses incurred in the state of the testator's domicile.

Id.—CHARGE UPON SUCCESSION.—The inheritance tax is a charge upon succession by inheritance or transfer by will.

Id.—SITUS OF CORPORATE STOCK IS IN STATE OF INCORPORATION.—The *situs* of stock in a corporation is in the state of the incorporation, for the purposes at least of the inheritance tax law, and any bequest thereof which results in its actual transfer in kind should subject it to payment of the inheritance tax upon its actual value.

Id.—PROCEEDING FOR COLLECTION OF INHERITANCE TAX—FINDINGS—PAYMENT OF DEBTS AND EXPENSES FROM ASSETS IN STATE OF DOMICILE.—In a proceeding in this state to enforce the payment of the inheritance tax on such property, findings showing that the value of the assets of the estate situated in the state of the testator's domicile was vastly greater than the aggregate amount of the debts and expenses there proven and incurred, justify the conclusion that such debts and expenses had been or would be paid out of the domiciliary assets, and that the property having its *situs* in this state had passed or would pass in kind and without diminution to the residuary legatees.

Id.—TRANSFER UNDER POWER OF APPOINTMENT—BOND TO SECURE PAYMENT OF TAX.—Where property is bequeathed to trustees, to pay the net income therefrom to a daughter of the testator, with power

to said daughter to will such property to whomsoever she might wish after her death, no transfer under the power takes place, within the meaning of the inheritance tax law, until the exercise thereof, and the trustees are not required to give a bond to secure the payment of such tax as may accrue upon the exercise of the power.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John J. Van Nostrand, Judge.

The facts are stated in the opinion of the court.

Hartley F. Peart, and U. S. Webb, Attorney-General, for Appellant.

James M. Allen, for Respondents.

SHAW, J.—The district court of appeal of the first district reversed the judgment of the court below herein. Upon respondents' application a rehearing was granted and the cause was transferred to this court for decision. Upon further consideration we approve the opinion written by Mr. Justice Hall and rendered by the district court of appeal. It is as follows:

“This is an appeal by the plaintiff from a judgment of the superior court, fixing the amount of the inheritance tax to be paid on certain shares of stock in three several California corporations, passing under the residuary clause of the will of Charles Adolphe Low, deceased.

“Plaintiff, as the treasurer of the city and county of San Francisco, brought the proceedings under the provisions of section 17 of the inheritance tax law of 1905. (Stats. 1905, p. 341.)

“The respondents, the executors of the last will of said decedent, appeared in said proceeding, and admitted that the property in question was subject to the inheritance tax under the statute, and the court, upon due proceedings, appointed an appraiser to appraise the said shares of stock, and to report thereon in writing to the court. The appraiser in due time made his report, and the court made findings thereon, filed conclusions of law, and rendered its judgment fixing the

amount of the taxes to be paid on account of said shares of stock.

“It appears from the record before us that said decedent died domiciled in the state of New York, where his will was duly admitted to probate and where he left large estate. He also left estate (the shares of stock in question) in this state, that is to say, he owned and his estate still owns shares of stock in three several California corporations. There has been no administration of the estate in this state, and the respondents are the executors appointed by the New York court.

“All debts were proved against the estate in the probate proceedings had in the state of New York. There do not appear to be any debts owing to any California creditors, and the estate in New York greatly exceeds the entire debts and expenses of administration. Indeed the value of the personal property alone in New York at the time of the death of the decedent exceeded the total debts and expenses of administration by upwards of \$348,000.

“The total value of the estate of decedent at the time of his death was \$1,622,933.89. All the property in California, being the stocks in the California corporations, was of the value of \$296,616.66, which was 18 1-5 per cent of the total value of the estate.

“The court in its conclusions of law held that the property in California subject to the inheritance tax should bear its proportion of the debts proved in New York, and the expenses of administration of the estate of decedent in New York, and accordingly deducted 18 1-5 per cent of such debts and expenses from the actual value of such property, and assessed the tax upon the remainder thus ascertained. It is this action of the court which presents the principal question to be determined upon this appeal.

“We think the court erred in thus deducting from the property in California the debts proved and expenses incurred in the probate proceedings in New York. It is not pretended that any debts are or were owing to any one in California.

“The court found ‘That the property in California is residue, and is to be distributed according to section seventh of the last will and testament of said Charles Adolphe Low.’ The seventh section of said will disposes of the ‘residue’ of the estate.

“Respondents in their brief correctly state that: ‘The legatees at bar take by decedent’s will the residue; the residue is what remains after paying the legacies of the will and the debts and expenses of administration.’

“That respondents’ conception of what is meant by the *residue* in the law of wills and administration is correct is amply supported by the following authorities: *Nickerson v. Bragg*, 21 R. I. 296, [43 Atl. 539]; *Stevens v. Underhill*, 67 N. H. 68, [36 Atl. 370]; *Addeman v. Rice*, 19 R. I. 30, [31 Atl. 429]; *In re Harvey*, 14 Or. 171, [12 Pac. 307]; *Phelps v. Robins*, 40 Conn. 264; Webster’s New International Dictionary.

“From the finding of the court that this California property is residue it is apparent that it has or will pass to the residuary legatees free of debts and expenses of administration. In other words, it will be distributed in kind to the residuary legatees. Under our system the title to property passes either by will or succession *upon the death* of the decedent, subject of course to the payment of the debts and other charges of administration. Where, as in this case, property having its *situs* in this state is not in fact resorted to for the payment of debts or expenses, but passes in kind to the legatee, and there are no debts due creditors in this state, and the estate in the state of the domicile is ample to pay all debts and expenses of administration, we see no reason why any deduction should be made from the actual value of the property that actually does pass in kind to the legatees. The inheritance tax is a charge upon succession by inheritance or transfer by will. (*In re Wilmerding*, 117 Cal. 281, [49 Pac. 181].) The *situs* of stock in a corporation is in the state of the incorporation, for the purposes at least of the inheritance tax law. (*Murphy v. Crouse*, 135 Cal. 19, [87 Am. St. Rep. 90, 66 Pac. 971]), and any bequest thereof which results in its actual transfer in kind should subject it to payment of the inheritance tax upon its actual value.

“There are no decisions of any appellate court of this state upon the point involved in this appeal, but the decision of the supreme court of Tennessee in *Memphis Trust Co. v. Speed*, 88 Tenn. 677, [88 S. W. 321], supports the doctrine that no deduction should be made on account of debts not shown to have been paid out of the property situate in Tennessee. In

the case just cited the domicile of the decedent was in Mississippi, where the principal administration was had. Ancillary administration was had in Tennessee, and the debts that the executor sought to deduct from the value of the estate in Tennessee, which consisted solely of stock in Tennessee corporations, were owing to Tennessee creditors; yet the court held that as it had not been shown that the debts in question had been paid from the estate in Tennessee, but that the estate in Tennessee remained intact for distribution, no deduction should be made from the value of the property in Tennessee.

“This case goes further than we are required to go, for in the case at bar there are no debts due California creditors.

“It has been decided in New York that where a decedent leaves estate in different states, that the debts due New York creditors should be deducted from the value of the estate in New York, though thus exhausting the New York estate, while the entire estate of decedent was perfectly solvent, and an apportionment of the debts to the estate in different states would leave a balance to be taxed in New York under its inheritance tax law. (*Matter of King*, 71 App. Div. 581, [76 N. Y. Supp. 220], [affirmed on appeal in 172 N. Y. 616, [64 N. E. 1122], no opinion]; *Matter of Grosvenor*, 124 App. Div. 331, [108 N. Y. Supp. 926]; *Matter of Grosvenor*, 126 App. Div. 953, [111 N. Y. Supp. 1121], [affirmed in 193 N. Y. 652, [86 N. E. 1124], with memorandum citing *Matter of King*, 71 App. Div. 581, [76 N. Y. Supp. 220], 172 N. Y. 616, [64 N. E. 1122].)

“As a corollary to the rule laid down in the above cited New York cases, it ought to follow that no deduction should be allowed, in a perfectly solvent estate at least, on account of debts due nonresident creditors or expenses of foreign administration not shown to have been paid or to be paid out of the California assets.

“For the reasons above set forth we think the court erred in making the deduction.

“One-fourth of the residue of the estate of the testator was given to trustees in trust, to pay the net income therefrom to one of the daughters of the testator, with power to said daughter to will such portion to whomsoever she might wish after her death. Appellant contends that the court should have required the trustees to give bond to secure the payment

of such tax as may accrue upon the exercise of such power of appointment. It would seem to be a sufficient answer to this contention to say that the statute imposing the tax, and authorizing the proceedings to enforce payment, makes no provision for exacting any such bond. Under the inheritance tax law (section 1) no transfer under the power takes place until the exercise thereof. This we do not understand to be disputed by appellant. Until such event takes place it cannot be known what, if any, tax will be due thereon. We do not think that the court erred in not exacting a bond from the trustees for the purpose of securing payment of a tax on a transfer of property not yet made, and which when made may not require the payment of any tax at all.

“The trial court has all the data and facts in the report of the appraiser and in the facts found by the court upon which to render a correct judgment.”

The main reason for the granting of the rehearing was that, as the decedent was a resident of New York at his death and it was not expressly found that the debts due his New York creditors and the expenses of administration in New York had in fact been paid out of his New York property, there might be a *prima facie* right in the residuary legatees to have a proportional amount of such New York debts and expenses deducted from the California assets, and to have the California inheritance tax computed only upon the balance.

Upon further consideration we are satisfied that the facts shown by the record were sufficient to raise a presumption that none of the California property would ever be used to pay the New York debts or expenses and that the California property had passed, or would pass, in its entirety, to the legatees. The circumstances put upon the legatees the burden of showing that said debts and expenses or some part thereof would have to be paid out of the California property. As they made no attempt to do so, the court below was justified in finding that the California property was residue to be distributed to the legatees. Its finding of that fact was equivalent to a finding that all said debts and expenses had been paid, or would be paid, out of the New York property. The other facts found justified this as a conclusion. The New York assets were of the value of \$832,790.38, of which \$538,565.38 was personal property. The said debts and ex-

penses aggregated \$189,836.47. In the ordinary course of procedure these debts and expenses, if they have not been paid, will all be paid out of the New York property. Hence, the California property will go to the legatees without diminution because of these New York debts and expenses and, accordingly, the inheritance tax should be computed upon its value without any deduction on account of said New York claims.

The respondents cite the New York decision in *Matter of Porter*, 67 Misc. Rep. 19, [124 N. Y. Supp. 677], which declares, in a case somewhat similar, that a *pro rata* deduction is proper under the facts shown in that case. In that case, however, it does not appear that the assets in the state of the decedent's domicile were sufficient to pay the debts and expenses of administration thereof. That case is, therefore, distinguishable from the case at bar because this fact does appear here.

The judgment appealed from is reversed and the trial court is directed to give judgment in accordance with this opinion.

Angellotti, J., Sloss, J., Henshaw, J., Melvin, J., and Lorigan J. concurred.

[Crim. No. 1732. In Bank.—November 7, 1912.]

THE PEOPLE, Respondent, v. POLOS PRANTIKOS,
Appellant.

CRIMINAL LAW—MURDER—INCOMPETENT EVIDENCE OF PRIOR MURDER—
ERROR CURED BY TESTIMONY OF DEFENDANT.—On a prosecution for murder, error in the admission of incompetent evidence to show a prior murder by the defendant, as a motive for the crime for which he was being tried, is cured, if the defendant, as a voluntary witness in his own behalf, testified to facts substantially corroborating all the incompetent evidence admitted.

Id.—KILLING OF POLICE OFFICER—PRIOR MURDER PART OF RES GESTAE—
EVIDENCE.—Where the defendant, after being arrested by a police officer, shot him, and immediately afterward, while endeavoring to escape from the scene, shot and killed another officer, the shooting of the first officer was part of the *res gestae* of the killing of

the latter, and on a prosecution for the latter, evidence of the first shooting, and that the officer subsequently died as the result thereof, is admissible.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

Jos. T. O'Connor, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, for Respondent.

HENSHAW, J.—Defendant was indicted for the murder of Thomas Finnely and suffered conviction of murder in the first degree with the death penalty imposed. The facts, without controversy, show that the defendant was a fugitive from the justice of the kingdom of Greece of which he was a subject. He was there accused of the murder of his cousin, John Condos. On the advice of his family he fled to the United States. According to the laws and custom of his country he was tried during his absence and found guilty. All this is shown by the testimony of the defendant himself. A nephew of John Condos so slain, by the defendant, discovered that the defendant was in San Francisco, and on the twenty-sixth day of November, 1911, at the Ferry building in San Francisco pointed out the defendant as a fugitive from justice, to Walter Castor, a police officer, who placed the defendant under arrest. The defendant submitted without resistance and with the officer proceeded quietly for a distance of about sixty feet. Then, suddenly, he drew a revolver, shot George Condos, shot the arresting officer twice and fled. Police officer Thomas F. Finnely came running to the scene and he too was fired upon by the defendant. One of the witnesses testified that Finnely slipped and fell and that the defendant shot him while he was down. Both officers died from the effects of their wounds. Condos recovered from his, and the defendant was put on trial for the Finnely murder.

Defendant was a witness in his own behalf. He testified to the facts above set forth touching the accusation against him

of the crime of murder, of which he asserted he was not guilty, his flight to America upon the advice of his family, and that he had been wandering about the United States for two years. He testified further that he had been tried and found guilty in Greece of the murder, and that members of the Condos family were seeking him for the two-fold purpose of having him returned to Greece for punishment and of securing the reward which the Grecian government had offered for his apprehension. All this had disturbed him greatly "so that he wondered he had any mind left." He had heard that a member of the Condos family was in San Francisco, and determined to leave San Francisco to avoid trouble. For this reason he was at the Ferry building and had purchased a revolver and was armed with it to prevent any member of the Condos family killing him. At the Ferry he was approached by Condos, who, with much vile language, said that he was going to have him sent to Greece to be executed. The police officer then put him under arrest. He knew that the police officer had authority to arrest him. As they walked along Condos, still talking in Greek, continued his vilification of him and of his family, so that "I lost my head and pulled my gun and started to fire." He sought to kill Condos for his insults. He did not mean to kill and did not know that he had killed the police officers; from the time that he began to shoot his mind was a blank.

Upon this appeal it is asserted that the defendant was deprived of the fair trial to which the law entitled him by the erroneous admission by the court in evidence of testimony concerning defendant's prior murder, his prior trial and conviction, his escape from justice, and the reward offered for his apprehension. It is not contended that legitimate evidence of these facts would be inadmissible, but rather the contention is that the evidence which was offered was incompetent. Thus Condos was asked if he knew of his own knowledge whether or not there was a reward offered by the Grecian government for the apprehension of the defendant, and answered "I know." This evidence was clearly admissible. Upon cross-examination, however, the same witness testified, when asked how he knew about the reward, "they wrote out a letter from Greece." The motion to strike out the testimony touching the reward was denied.

Again, it is said that the evidence admitted, touching the prior murder in Greece, was incompetent. But Condos testified that the murdered man was his uncle and that defendant had shot and killed him with a rifle. His testimony is that fifteen minutes before the murder he was with Prantikos, that Prantikos left him and killed his uncle. He did not actually see the killing, but saw him running away and went after him to catch him. This evidence was clearly admissible. Summing up upon these matters appellant admits, as indeed he must, that evidence of his crime in Greece, his flight from justice, his trial and conviction and the reward offered for his apprehension were one and all admissible as proving a motive for his later crime. (*People v. Pool*, 27 Cal. 572; *People v. Durrant*, 116 Cal. 179, [48 Pac. 75].) Whatever imperfections existed in the character of the evidence introduced for this legitimate purpose, it is a sufficient answer to say that the defendant himself voluntarily took the witness stand and told a story completely corroborating everything that was testified to by the prosecution, saving in the one particular that he denied having committed the murder in Greece.

Evidence was admitted touching the shooting and the subsequent death of officer Castor. In view of the nature of the murder, the shooting of Castor was unquestionably a part of the *res gestae*, nor can any valid objection be shown to the proof that Castor subsequently died of his wound. That testimony touching the results of the post mortem examination was given with more elaboration and detail than necessary cannot be held to be a ground for reversal.

It is finally said that by the admission of all this evidence "the defendant was deprived of any defense that rested upon his state of mind." He was not deprived of this defense. He made it, and as bearing upon that defense and as showing the reason for his disturbed state of mind he himself testified to many, if not most, of the matters concerning which the prosecution introduced evidence.

The judgment and order appealed from are therefore affirmed.

Shaw, J., Angellotti, J., Melvin, J., Lorigan, J., and Sloss, J., concurred.

[L. A. No. 3015. In Bank.—November 8, 1912.]

C. E. THAYER and W. A. THAYER, Respondents, v. CALIFORNIA DEVELOPMENT COMPANY (a Corporation), and W. H. HOLABIRD, Its Receiver, Defendants and Appellants; IMPERIAL WATER COMPANY NO. 1, Intervener and Appellant.

WATER—APPROPRIATION FOR BENEFICIAL USE—RIGHT ACQUIRED IS PRIVATE—STREAMS UPON PUBLIC DOMAIN.—Under the law of this state as established at the beginning, and as embodied in the Civil Code of 1872, the water-right which a person gains by diversion from a stream for a beneficial use is a private right, which is subject to ownership and disposition by him as in the case of other private property. The same is true as to the water-rights in streams upon the public domain in California which the act of Congress of July 1, 1866, confirmed or provided for the acquisition of in the future.

Id.—WATER DEDICATED TO PUBLIC USE—ACQUISITION AND DEDICATION DISTINCT ACTS.—Even when property is dedicated or appropriated to public use for gain by persons or private corporations, the title and ownership is private and the only interest of the public is that of beneficiaries of the use or trust. The property does not become impressed with a public use or trust until after the owner has first acquired it and then dedicated it to the use. The acts of acquisition and of dedication respectively are distinct from each other, and, technically the latter must follow the former and cannot precede or accompany it.

Id.—APPROPRIATION NOT A DEDICATION TO PUBLIC USE.—An “appropriation of water” under the Civil Code is not, *ipso facto*, a dedication or appropriation to public use. The additional act of dedication is as necessary to the creation of a public use in a water-right so acquired as it would be if the right was acquired by conveyance or in any other manner, or as in the case of any other property dedicated to public use.

Id.—ESSENTIAL FEATURES OF PUBLIC USE—USE OPEN TO INDEFINITE PUBLIC.—The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character.

Id.—USE OF WATER IN MUNICIPALITIES—WATER FOR IRRIGATION WHEN NOT A PUBLIC USE—USE LIMITED TO PARTICULAR CLASS.—In the case of a public use of water in villages, towns, and cities, the right to the use usually extends to every inhabitant within the range of the distributing system or who can get access thereto. In the case of

water for irrigation, the class is necessarily more select, and does not include the general public within the area served. This is so because only those occupying land can make use of the water. For this reason, while there may be a public use for the benefit of landowners, the use of water for irrigation is not public unless the water is available, as of right, upon equal terms, to all landowners of the class and within the area to be benefited who can get water from the ditches to their lands. If the dispenser of water has the right to say who shall have it, and upon what terms, selling to one and refusing to sell to another at will, it is not devoted to public use.

ID.—USE OF WATER LIMITED TO LANDOWNERS WHO ARE STOCKHOLDERS IN CORPORATION RECEIVING IT.—A water company, whose method for the disposition of the water appropriated by it for the use of itself and others for the purpose of developing power and for the irrigation of land in a specified territory, and whose conduct in distributing the same, have been wholly inconsistent with the idea that the water was held out for general sale or distribution, and were consistent only with the theory that the intention was to retain control of the water to the extent, at least, of choosing for itself the persons and corporations to whom it should be sold or delivered, and the terms and conditions on which such sales or deliveries should be made, and whose uniform practice had been to furnish water to certain subsidiary corporations organized by it for the irrigation of such lands situated within specified districts as should belong to their stockholders, and to no other persons, on certain prescribed conditions for the apportionment of the water between such stockholders, and for the payment therefor, did not devote its water to public use.

ID.—CHARACTER OF RECIPIENT CORPORATIONS.—The effect of such a sale and distribution is the same whether the corporations to whom the water was furnished were merely subsidiary to and agents of the distributing company or were or should become independent companies, and merely purchasers of the water so sold and distributed.

ID.—PUBLIC USE CARRIED ON IN FOREIGN COUNTRY—SERVICE IN CALIFORNIA NOT AFFECTED.—The fact that such distributing company was carrying on a public use in a foreign country, and had received from that country a grant of the power of eminent domain, would not affect the character of the service of the corporations doing business in California to whom it distributed water, and the fact that it derived all of its water from the same source is immaterial. A part of a stream, or a part of a single appropriation, may be devoted to public use and another part entirely to private use.

ID.—CONSTRUCTION OF CONSTITUTIONAL PROVISION AS TO PUBLIC USE OF WATER.—Section 1 of article XIV of the constitution, providing that "the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to

be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law," does not create a public use whenever any water is sold or distributed, regardless of the number of persons to whom it is delivered, the manner or character of the disposition made of it, or of the transfer of the right thereto.

ID.—MEANING OF TERM "APPROPRIATED" WATER.—The word "appropriated," as used in that section, does not refer to the act by which the water is acquired, as for example, the taking from the stream, but to the act or acts by which it is designated, set apart, and devoted to the purposes of sale, rental, or distribution. Such section must be understood to apply, as it has previously always been construed to apply, to cases where one has appropriated water generally, for sale, rental, or distribution, and not to cases where sales are made to particular persons at a fixed price by ordinary contracts of purchase and sale.

ID.—RIGHTS TO WASTE WATER NOT USED BY APPROPRIATOR.—The fact that such distributing company conducts more water through its canals than is used, and that there is always some waste water discharged from its distributing system, did not impose upon it the obligation of furnishing such excess to a person who did not belong to the class to whom its disposition of water was limited. So much of the water as may be unavoidably wasted is to be deemed a part of that which is appropriated to the beneficial use and which the company has the right to take. So far as any other waste water is concerned, it is water to which the company has acquired no right by its appropriation, because not applied to a beneficial use, and is subject to appropriation by others.

APPEALS from a judgment of the Superior Court of Imperial County. George H. Hutton, Judge presiding.

The facts are stated in the opinion of the court.

J. W. McKinley, W. B. Mathews, and S. B. Robinson, for W. H. Holabird, Receiver, Appellant.

Hunsaker & Britt, and W. N. Goodwin, for Intervener and Appellant.

Conkling & Brown, for Respondent.

Lewis F. Byington, Ernest Weyand, Haines & Haines, W. H. Sprague, John M. Eshleman, Max Thelen, and Douglas Brookman, *Amici Curiae*, also for Respondent.

THE COURT.—This is a proceeding in *mandamus*, instituted in the superior court of Imperial County on December 20, 1910, to compel the California Development Company a corporation, through its receiver, to deliver to plaintiff C. E. Thayer, the wife of her coplaintiff, W. A. Thayer, out of its central main in Imperial Valley, water to irrigate her lands, upon the theory that the water therein is appropriated and held by it for sale, rental, and distribution generally to the members of that farming neighborhood. Defendants and intervenor joined issue on that question. The trial court found with plaintiffs and entered judgment accordingly. These are appeals from such judgment by defendant Holabird, the receiver, and by the intervenor.

The California Development Company was organized under the laws of the state of New Jersey, for the purpose, among others, of acquiring, holding, constructing, and maintaining headings, dams, ditches, etc., for collecting, storing, and conducting water and irrigating land; supplying and distributing water to and irrigating and cultivating the land of itself and of others; and of selling or letting such water or the right to use the same. On December 15, 1895, it caused to be posted at a point on the Colorado River in this state, distant one thousand six hundred feet north of the point where the international boundary line between the United States and Mexico crosses said river a notice of appropriation claiming for itself and others ten thousand cubic feet flow per second of the waters of said river at that point. The notice further stated that it claimed the right to said water for the purpose of "developing power and for the irrigation of land in San Diego County, state of California, and in Lower California, Republic of Mexico." It was also stated in said notice that "we purpose carrying the water from the above described point of diversion through a canal which will run in a southwesterly direction through Lower California, Republic of Mexico, and thence into that portion of San Diego County, state of California, lying to the east of the San Jacinto Mountains and known as the 'New River Country.' Said canal will be 200 feet in width and will carry a depth of 10 feet of water. Its length will be 50 miles, more or less." The detour into Mexico was rendered necessary by topographical conditions. The portion of San Diego County referred to was what is

now known as the Imperial Valley, and all of the same is now contained in the subsequently created county known as Imperial County. In furtherance of its general plan, the California Development Company caused a corporation to be formed under Mexican laws, as its agent and instrument in Mexico, known as "La Sociedad de Yrrigacion y Terrenos de law Baja California (Sociedad Anonima)," the capital stock of which has always been owned and controlled by it, and which practically is the California Development Company under another name. Through this agency it holds all its Mexican property, including some one hundred thousand acres of land, and enters into contracts, including contracts for the furnishing of water in Mexico. The existence of this separate corporation is really an immaterial matter so far as the questions involved in this case are concerned. Whatever was done through it will be regarded as in fact done by the California Development Company.

Before January 11, 1902, said Development Company had constructed from said point on the Colorado River at which its notice of appropriation was posted, known as Hanlon's heading, southwesterly through Mexico a distance of twenty miles, and thence northwesterly to a point on the international boundary line, a canal with the capacity sufficient to carry and deliver at said point not less than one thousand five hundred cubic feet of water per second.

Said company has never owned any of the land in Imperial Valley to which it proposed to furnish water for irrigation. Those lands are naturally arid and desert in character and without irrigation are worthless and uninhabitable, but are of great and exceptional fertility when irrigated. They are irrigable from the Colorado River and from no other source. At the date of the organization of the Development Company, such valley was unoccupied and a desert, and substantially the whole thereof was surveyed public land of either the United States or the state of California.

The plan adopted by the Development Company for its disposition of the water for irrigating such lands was substantially as follows: The company mapped out districts of territory in Imperial Valley as units of irrigation, each of which was to be occupied by a mutual water company formed under the laws of this state. These companies were to be

organized by the Development Company, each of said companies to have a capital stock divided into as many shares as there were approximately acres of land in the district described in its articles of incorporation, which the Development Company believed could be reasonably irrigated. The purpose of each said company was to be to procure water for the irrigation of said tract and distribute the same upon land owned by its stockholder only within said general tract, at the rate of not to exceed four acre feet per annum per acre for each share of stock owned by each stockholder, and for its stockholders only. Each share of stock was to be located upon lands at the rate of one share per acre for each acre of land owned by stockholders where the same could be served by the ditches of the company. The Development Company was to furnish to each of said mutual companies the requisite water for its purpose at a fixed charge per acre foot.

The Development Company caused seven of such mutual companies to be organized, known as Imperial Water Companies Nos. 1, 4, 5, 6, 7, 8 and 12, with an estimated aggregate of irrigable land of four hundred thousand acres. Imperial Water Company No. 1 was organized by five agents of the Development Company on March 23, 1900. The district allotted to it was estimated to contain one hundred thousand acres of irrigable land, and the capital stock therefor was made one hundred thousand shares, with a par value of ten dollars per share. Among its purposes declared in its articles was one to secure a supply of water for irrigation, domestic, and other purposes and to distribute the same at cost among its stockholders only for use on the lands situated in its district, which were described therein. The by-laws were in accord with the plan already referred to, and required each share of stock to be located on land in the district, and restricted the use of water to land on which stock had been located. The stock was transferable and its place of location could be changed by the owner to any land within the district of a mutual company issuing it.

Under a contract between said Imperial Water Company No. 1 and the Development Company, all of the stock of the former, except two thousand five hundred shares, was sold by the Development Company for its own benefit, at an average of fifteen dollars per share, in consideration of which the

Development Company constructed a main canal through the territory of the mutual water company, of sufficient capacity to convey the requisite amount of water to irrigate the lands of the stockholders, being an amount in the aggregate not less than sufficient to furnish annually four acre feet of water for each outstanding share of stock of the mutual water company, and also constructed the necessary lateral or distributing ditches which are owned by the mutual water companies. The Development Company agreed to perpetually furnish said water through such canal and the lateral ditches for fifty cents for each acre foot delivered. Substantially similar contracts were made with each of the other water companies.

All of the stock of Imperial Water Company No. 1, including the two thousand five hundred shares retained by it, has been sold to individuals who have located the same upon land in the district of said company, and are cultivating the same, and the Development Company has been delivering water to such mutual company in accordance with its undertaking. The same is true as to the other mutual companies. Neither the Development Company nor its receiver has ever delivered or furnished any water for irrigation or other purposes to any land in Imperial Valley, or to any consumer of water other than under and in accordance with such agreements, except that water has been furnished under contract to the city of Imperial, a municipal corporation, and to the Holton Power Company, and all water delivered to such companies has been delivered under and in pursuance of the terms of said agreement.

Since the year 1904, said mutual corporations have not been controlled or dominated by the Development Company.

There are between fifteen thousand and thirty thousand acres of land within the district of Imperial Water Company No. 1 in excess of the number of shares of the capital stock provided in its articles of incorporation. Plaintiff C. E. Thayer owns forty acres of such land which is in condition for cultivation and irrigation, and which she desires to irrigate and plant, but upon which no water stock has been located. This land is under the flow of the canal of the Development Company, and constitutes a part of the lands for irrigation of which the said waters were appropriated. By reason of the fact that all of the stock of said Imperial Water

Company No. 1 has been disposed of to others who have located it upon other land, she is unable to procure stock to locate thereon, and Imperial Water Company No. 1 has no water except such as it has procured for its stockholders. On October 18, 1910, she demanded of the defendant receiver that he deliver to her water for the irrigation of such land—namely, one hundred miner's inches for twenty-four hours, tendering him twenty dollars therefor, which, as we understand, is at the rate of fifty cents for each acre foot, which it is claimed was the rate fixed and charged by said Development Company to the other consumers of water. The board of supervisors of Imperial County has never fixed the rates at which the Development Company shall sell, etc., water in such county. The receiver refused to comply with the demand of Mrs. Thayer.

On December 13, 1909, an action was commenced in the superior court of Imperial County by the Title Insurance & Trust Company, a corporation, against the Development Company and others to foreclose the mortgage held by the plaintiff therein upon the irrigation system of the Development Company, and on the same day defendant Holabird was appointed by said court receiver of said system, and has ever since been in control and management of said system.

There was, we think, enough in the evidence to sustain the conclusion of the trial court substantially to the effect that the Development Company had sufficient water to comply with the demand of Mrs. Thayer, without impairing its ability to furnish to those with whom it was under contract the water required by them.

The evidence shows that the Development Company, through its Mexican agency, furnishes water for irrigation to individual consumers in Mexico, at the rate of fifty cents for each acre foot.

The agreements between the Imperial Water Company No. 1 and the Development Company provided that all water delivered to the former is delivered at the Mexican boundary line, and the Development Company has no interest in said water so delivered after it is delivered at said place. Said Development Company is the owner of the main canal in such district through which such water is carried.

The claim of the plaintiff is, and of necessity must be, that the California Development Company is, either directly, or indirectly through auxiliary companies, engaged in supplying water for public use, that the water controlled by it is dedicated to such use, that the land of plaintiff, C. E. Thayer, is a part of the lands to which such water is dedicated and, therefore, that she is entitled to a portion of the water for the irrigation thereof, on payment of the lawfully established rate therefor. (See *Fellows v. Los Angeles*, 151 Cal. 58, [90 Pac. 137].) The controlling question in the case, therefore, is whether or not the water here involved is devoted to public use.

Under the law of this state as established at the beginning, the water-right which a person gains by diversion from a stream for a beneficial use is a private right, a right subject to ownership and disposition by him, as in the case of other private property. All the decisions recognize it as such. Many of them refer to it in terms which can have no other meaning than that the right is private property. We need not cite them all. The following early cases sufficiently establish the proposition: *Eddy v. Simpson*, 3 Cal. 251, [58 Am. Dec. 408]; *Irwin v. Phillips*, 5 Cal. 146, [63 Am. Dec. 113]; *Tartar v. Spring Creek Co.*, 5 Cal. 398; *Conger v. Weaver*, 6 Cal. 557, [65 Am. Dec. 528]; *Hoffman v. Stone*, 7 Cal. 49; *Maeris v. Bicknell*, 7 Cal. 262, [68 Am. Dec. 257]; *Hill v. King*, 8 Cal. 336; *Kimball v. Gearhart*, 12 Cal. 47; *Ortman v. Dixon*, 13 Cal. 38; *Kidd v. Laird*, 15 Cal. 180, [76 Am. Dec. 472]; *Rupley v. Welch*, 23 Cal. 455.

By the act of Congress of July 1, 1866, [14 Stats. 251], the United States confirmed all water-rights then vested, in streams upon the public domain in California, and provided for the acquisition of similar rights therein in the future. These, of course, became private property when so acquired. (*DeNecochea v. Curtis*, 80 Cal. 397, [20 Pac. 563, 22 Pac. 198]; *Natoma Water etc. Co. v. Hancock*, 101 Cal. 42, [31 Pac. 112, 35 Pac. 334].)

The Civil Code of 1872 recognizes and declares the same doctrine and prescribes the mode by which water-rights may be gained and protected. Section 1410 declares that "the right to the use of running water" of a stream, cañon or ravine "may be acquired by appropriation." The succeed-

ing sections to 1422 inclusive, prescribe the mode by which it may be acquired. The language plainly imports that the right when acquired, is the property of the person who claims it and takes the steps prescribed to gain it. And, generally, it is true that, even when property is dedicated or appropriated to public use for gain by persons or private corporations, the title and ownership is private and the only interest of the public is that of beneficiaries of the use or trust. The property does not become impressed with a public use or trust until after the owner has first acquired it and then dedicated it to the use. The acts of acquisition and of dedication respectively, are distinct from each other. Technically the latter must follow the former and cannot precede or accompany it. An "appropriation of water" under the code is therefore not, *ipso facto*, a dedication or appropriation to public use. The additional act of dedication is as necessary to the creation of a public use in a water-right so acquired as it would be if the right was acquired by conveyance or in any other manner, or as in the case of any other property dedicated to public use. It follows that if the water appropriated from the Colorado River by the California Development Company is now devoted or dedicated to public use so as to be available to the use of the plaintiffs, it is because of some acts or declarations of that company other than those by which it acquired the right to divert the water from the river.

Definitions of the term "public use" are usually found in decisions involving the right of eminent domain or in those relating to public charities. A bequest to establish a home for the orphans of deceased Odd Fellows is not made to a public use. In deciding this point the court says: "It is an essential feature of the latter (a public trust) that the beneficiaries are uncertain; a class of persons described in some general language, often fluctuating, changing in their individual members, and partaking of a *quasi* public character. . . . The smallest street is public, for all have an equal right to travel on it; but a way used by thousands, which may be shut against a stranger, is private." (*Troutman Co. v. De Boissiere*, 66 Kan. 1, [71 Pac. 286]; *Pennoyer v. Wadhams*, 20 Or. 274, [11 L. R. A. 210, 25 Pac. 720]; *Burd Orphan Asylum v. School Dis.*, 90 Pa. St. 29.) "The gen-

eral public must have a definite and fixed use of the property to be condemned; a use independent of the will of the private person or private corporation in whom the title to the property, when condemned, will be vested, a public use, which cannot be defeated by such private owner." (*Fallsburg P. Co. v. Alexander*, 101 Va. 98, [99 Am. St. Rep. 855, 61 L. R. A. 129, 43 S. E. 194].) This case holds that water to be acquired by a company for transmission and distribution to any place "for its own use or for the use of other individuals or corporations," would not be devoted to public use, because the company retained power to choose who should have it. (See, also, *Tyler v. Beacher*, 44 Vt. 648, [8 Am. Rep. 398]; *In re Barre*, 62 Vt. 32, [9 L. R. A. 195, 20 Atl. 109]; *Ryerson v. Brown*, 35 Mich. 333, [24 Am. Rep. 564].) The term "public use" "implies 'the use of many' or 'by the public,' but it may be limited to the inhabitants of a small or restricted locality, but the use must be in common and not for a particular individual." (*Pocantico v. Bird*, 130 N. Y. 249, [29 N. E. 246].) Water carried in a ditch to be let out for hire to all who apply for it, is devoted to public use. (*Paxton v. Farmers' Co.*, 45 Neb. 894, [50 Am. St. Rep. 585, 29 L. R. A. 853, 64 N. W. 343].) Market stalls which the owner lets out to such persons and upon such terms as he chooses are not in public use. The test is "whether the public have the legal right to the use, which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner." (*Farmers' Market Co. v. Railroad Co.*, 142 Pa. St. 580, [21 Atl. 902, 989].) "The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character. The smallest street in the smallest village is a public highway of the commonwealth, and none the less so because the vast majority of the citizens will never derive any benefit from its use. It is enough that they may do so if they choose." (*White v. Smith*, 189 Pa. St. 228, [43 L. R. A. 498, 42 Atl. 125]; *Donohugh's Appeal*, 86 Pa. St. 306. See, also, *Phillips v. Watson*, 63 Iowa, 33, [18 N. W. 659]; *Bennett's Appeal*, 65 Pa. St. 250; *Dalles v. Urquhart*, 16 Or. 67, [19 Pac. 78].)

In the case of the use of water in villages, towns, and cities, the right to the use usually extends to every inhabitant

within the range of the distributing system or who can get access thereto. In the case of water for irrigation, the class is necessarily more select, and does not include the general public within the area served. But this is so because it is not every inhabitant that can make that use of the water. Only those occupying land can do so. And for this reason it is held that while there may be a public use for the benefit of landowners, the use of water for irrigation is not public unless the water is available, as of right, upon equal terms, to all landowners of the class and within the area to be benefited who can get water from the ditches to their lands. If the dispenser of water has the right to say who shall have it, and upon what terms, selling to one and refusing to sell to another at will, it is not devoted to public use.

In *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 161, [41 L. Ed. 369, 17 Sup. Ct. Rep. 56], the United States supreme court was considering the question whether or not the water belonging to an irrigation district organized under the California statute of 1887, and acquired for and applied to its authorized uses and purposes, was water dedicated to a public use. The circuit court had decided that it was not for public use and that the district works were not public improvements, because the water was held for the exclusive use of the landowners of the district and not for the general public within its limits. Upon this question the supreme court on appeal said: "The fact that the use of the water is limited to the landowner is not therefore a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use. All landowners in the district have the right to a proportionate share of the water, and no one landowner is favored above his fellows in his right to the use of the water. It is not necessary, in order that the use should be public, that *every resident* in the district should have the right to the use of the water. The water is not used for general, domestic, or for drinking purposes, and it is plain from the scheme of the act that the water is intended for the use of those who expect to use it on their lands. . . . We think it clearly appears that all who by reason of their ownership of or connection with any portion of the lands would have

occasion to use the water would in truth have the opportunity to use it upon the same terms as all others similarly situated. In this way the use, so far as this point is concerned, is *public because all persons have the right to use the water under the same circumstances*. This is sufficient." (The italics are ours.)

The decisions in this state are to the same effect. The first and leading case on the general subject is *Gilmer v. Lime Point*, 18 Cal. 229, where it was held that a fort for protection against foreign invasion was a public use for which the state might authorize the condemnation of land. The court said (p. 252): "This public use need not be a use general or common to all the people of the state alike. It may be a use in which a small portion of the public will be directly benefited, as a street in a town, a bridge or a railroad, necessarily local in its benefits and advantages, but it must be of such a character as that the general public may, if they choose, avail themselves of it." In *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 590, [99 Am. Dec. 300], the plaintiff corporation was organized to take water from the Yuba River and use the same for mining and mechanical purposes and to sell it to others for mining purposes. It does not appear that it was offered generally to the public. The court said that the corporation was under no obligation to the public to continue the business, and that it "was created for the immediate benefit of its stockholders, with no direct specific public purpose in view, as in the case of a railroad or turnpike or canal company. The only interest the public has in the continuance of the business is the remote, general interest, which it has in the proper development of the resources of the country"; in effect, that its property was not devoted to public use. In *Price v. Riverside*, 56 Cal. 432, it is said that every corporation formed under the act of 1862, [Stats. 1862, p. 540], "has impressed upon it a public trust—the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it has been created." In *McCrary v. Beaudry*, 67 Cal. 120, [7 Pac. 264], it was decided that water conducted through pipes laid in the streets by permission of the city of Los Angeles, and supplied by the owner to residences along those streets at fixed rates, was devoted to a public use, and that residents

along such streets who had received the water were entitled to have the service continued on paying the rates. In *Merrill v. South Side I. Co.*, 112 Cal. 426, [44 Pac. 720], the defendant company was engaged in selling, distributing, and delivering water for irrigation upon the lands along the line of its pipe. Plaintiff's land was along said pipe-line and defendant had sold plaintiff water to irrigate the same, but refused to continue to do so and extended its pipes to new lands to which it delivered the water previously supplied to plaintiffs. It was held that this was a public use for the lands along the pipe-line and that *mandamus* would lie to compel a continuance of the supply to the plaintiff. In *Hildredth v. Montecito C. W. Co.*, 139 Cal. 29, [72 Pac. 395], it was held that if the owners of several distinct water-rights in a stream should form a corporation and give to it the duty of diverting and distributing the water to the respective persons entitled, such water was not thereby devoted to a public use. The court said that: "The right of an individual to a public use of water is in the nature of a public right possessed by reason of his *status* as a person of the class for whose benefit the water was appropriated or dedicated. All who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not." In *McFadden v. Los Angeles*, 74 Cal. 571, [16 Pac. 397], a corporation had acquired water to be used on the land of its stockholders only, and at rates fixed by the corporation. It was not appropriated or offered for sale to others, or to the public generally, but the stockholders were very numerous and the corporation supplied water for some twelve thousand acres of land. It was declared not to be a public use, the court saying: "We know of no reason why individuals cannot associate themselves together, take on a corporate form, and acquire water to be used on their own lands," and that in such a case the supervisors had no power, under the act of 1885 (Stats. 1885, p. 95), to fix rates as for a public use, or at all. The proposition that such a use of the water is not a public use was again affirmed in *McDermont v. Anaheim U. W. Co.*, 124 Cal. 114, [56 Pac. 779], and in *Barton v. Riverside W. Co.*, 155 Cal. 518, [23 L. R. A., (N. S.), 331, 101 Pac. 790]. In *Leavitt v. Lassen I. Co.*, 157 Cal. 83, [29 L. R. A. (N. S.) 213, 106 Pac. 404], the water had been ap-

propriated for sale, rental, and distribution, the system had been in operation several years and it was conceded to be a public use. It was held that the purveyor of the public use cannot make binding contracts to deliver to a landowner under the system more than his proportionate share of the water, or give him a preferential right over others, nor make any unfair discrimination between the beneficiaries of the use.

Under the doctrines thus established, it is evident that the California Development Company has not dedicated to public use the water which it diverts from the Colorado River and that it has not offered it for sale, rental, or distribution in such a manner as to constitute a public use thereof. In its notice of appropriation it declared that it claimed the water for *itself and others*. It did not claim it for use by the public, nor designate the "others" to whom it was to be furnished. The notice stated that the water was claimed for the purpose of developing power and for the irrigation of lands in the "New River Country" situated in what was then San Diego County, but it did not say that it was to be used upon all said lands, nor generally upon the lands in said country. Upon each of these essential elements of a public use the most that can be said is that the notice is silent. There never was any declaration by that company that the water was to be devoted to public use or that it was to be offered generally for sale in California, or to all landowners in the New River Country, or in any district or part thereof, or even to all landowners along the lines of its ditches or the ditches of its auxiliary companies. No such offer or declaration has ever been made, nor has it ever been the custom or practice of the company, or of its auxiliary companies, to sell water in that way. The method adopted by it for the disposition of the water, and its conduct in distributing the same, have been wholly inconsistent with the idea that the water was held out for general sale or distribution, and it has been consistent only with the theory that the intention was to retain control of the water to the extent, at least, of choosing for itself the persons and corporations to whom it should be sold or delivered, and the terms and conditions on which such sales or deliveries should be made. It has, in fact, retained such control and it has not disposed of the water otherwise than according to this plan. For this purpose it laid out seven separate dis-

tracts in the New River Country, with distinct boundaries. In each of these it organized a private water corporation. The purpose of each corporation, as expressed in its articles, was to procure water for the irrigation of such lands situated within the exterior limits of the district as should belong to its stockholders, and to no other persons. Each share of the stock was to be located upon certain designated lands, one share being allotted to each acre, and the water was to be apportioned ratably among the stockholders according to the number of shares owned. The stock was not free, but was to be sold at a fixed price. To these corporations, and to no other persons, the Development Company sold the water it diverted, receiving therefor certain shares of stock of said corporations with the right to sell the same and have them located on lands in the district by the purchasers, and with an agreement by each auxiliary company to pay thereafter an annual charge of fifty cents per acre foot for the water delivered to it. There were other restrictions which it is not necessary to mention. The Development Company sold the stock of these auxiliary companies to the landowners within the respective districts and the same has been located by the respective companies upon particular tracts of land therein. No water has ever been sold or distributed or offered for sale or distribution, in any other way, or to any other persons, except small quantities furnished by special agreement to a power company and to the city of Imperial. No right in any other person to demand or receive water upon any terms or at all has ever been recognized, allowed, or conceded either by the Development Company or any of the auxiliary companies. It appears, therefore, that the Development Company has always, either directly or through the auxiliary companies, selected the persons to whom it would sell and distribute the water and fixed its own prices. A use thus restricted, limited, and controlled by the owner, is in no proper sense, according to the foregoing authorities, a public use.

We have hitherto considered the case upon the theory that all the other corporations mentioned, including the Mexican Company, are but subsidiary to and agents of the California Development Company for the carrying out of its plan for the distribution of its water. The effect is the same, however, if those companies should become, or be considered,

independent companies, that is merely purchasers of the Development Company's water. It is true that since their organization the districts, by reason of the sales of their corporation stock to the landowners, have become independent, so far as management is concerned, of the Development Company, although still bound by the contracts made between them. But if they are viewed as independent companies, the fact remains that the Development Company has not sold, or proposed to sell, or disposed of its water at all, except to those companies and to them only upon the terms and restrictions fixed by the respective contracts, and that those companies have not applied the water to public use, but have held the same exclusively for their respective shareholders upon terms fixed by the by-laws of the company. It appears that the Mexican Company is selling a part of the water to consumers in Mexico along its line. This does not change the result. It does not appear that this water is sold or offered to the public generally, or to all landowners along the line. Even if it were so, the fact that this company is carrying on a public use in Mexico would not affect the character of the service of the other companies doing business in California. It is very clear from all the proceedings taken, that the Development Company, not only did not intend to engage in a public service, but that it was well advised concerning such service and carefully devised its plan and drew its contracts to avoid being placed in that position. The company has placed itself clearly within the principles stated in *McFadden v. Los Angeles*, 74 Cal. 571, [16 Pac. 397]; *McDermont v. Anaheim Co.*, 124 Cal. 114, [56 Pac. 779], and *Barton v. Riverside*, 155 Cal. 518, [23 L. R. A. (N. S.) 331, 101 Pac. 790], under which the use which it makes of the water is not a public use.

The plaintiff claims, however, that notwithstanding these decisions and the well established meaning of the phrase "public use" as shown by the other decisions cited, the meaning of the phrase is defined in section 1 of article XIV of the constitution in terms which necessarily creates a public use whenever any water is sold or distributed, regardless of the number of persons to whom it is delivered, the manner or character of the disposition made of it, or of the transfer of the right thereto. The part of the section defining the

phrase is as follows: "The use of all water now appropriated, or that may hereafter be appropriated for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law." The remainder of the section provides for the fixing of rates for the use of water in municipalities. Section 2 declares that the right to collect rates for water supplied to a county, city and county or town, or the inhabitants thereof, is a franchise to be exercised only under and as prescribed by law.

In *Merrill v. Southside I. Co.*, 112 Cal. 426, [44 Pac. 720], it was held that the word "appropriation," in section 1 aforesaid, does not refer to the act by which the water is acquired, as the taking from the stream, for example, but to the act or acts by which it is designated, set apart, and devoted to the purposes of sale, rental, or distribution. According to the theory of the plaintiff in this case, whenever the owner of a water supply determines to and does sell it for a price agreed on between himself and the purchasers, it immediately becomes subject to public use, and any other person to whom it can be conveniently distributed in the same manner would have the right to a proportionate share of the water on the same terms as the purchasers, and, if the supply is limited, the first purchasers must divide with all others who may come in and claim a share. Under that theory, where a person having a surplus of water parts with a portion of it by sales to others he thereby appropriates such portion to purposes of sale and dedicates it to public use. This application of the section would destroy private rights in water and convert every sale thereof into a dedication to public use. We do not believe that the constitution was intended to have such effect, or that it should be so construed. Article XIV taken as a whole shows plainly that it was intended to regulate the use of water appropriated and dedicated generally for sale and distribution among an indefinite number of users. It could not have been intended to declare that a single sale of a part of his water by one having more than he needs would convert the use into a public use in which others could share. If a single sale could not do this, other sales of like character would not accomplish it. The

section must be understood to apply to cases where one has appropriated water generally, for sale, rental, or distribution, and not to cases where sales are made to particular persons at a fixed price by ordinary contracts of purchase and sale. To compel such a subdivision and distribution of water supplies as this construction would entail would destroy the value of all water-rights. In this state the water supply is so small that large areas must go without irrigation entirely. Such water as there is must be applied, as far as it will go, in quantities sufficient to make the lands profitably productive. The principal benefit of irrigation comes from its use in growing vineyards and orchards. These require a large expenditure and a permanent water supply to make them profitable. If those engaging in such enterprises know that they must be ready always to divide their water supply with those in the vicinity who may subsequently choose to engage therein, such enterprises would be discouraged, the development, growth, and progress of the state would be much retarded and its productive capacity greatly decreased.

This provision of the constitution has been in force thirty-three years. It has never been understood that it had the effect here contended for. There have been many instances in which the owners of large tracts of land have acquired water, conducted the same to the land, and sold and conveyed the land in small tracts to actual settlers with a proportionate share of the water appurtenant to the land, coupled with an agreement to continue the water supply at a fixed annual rate. Such a disposition is essentially a matter of private contract and it shows no intent to create a public use. It has also been a frequent practice to effect the same general purpose by forming a corporation to hold the water supply and to issue stock at a fixed price entitling the holder to a share of the water at a fixed annual rate, thus making the stockholders themselves the indirect owners of the water. Many decisions of this court in various ways concern corporations of this character. Among them are the following: *Richey v. East R. W. Co.*, 141 Cal. 221, [74 Pac. 754]; *Estate of Thomas*, 147 Cal. 236, [81 Pac. 539]; *Southside I. Co. v. Burson*, 147 Cal. 406, [81 Pac. 1107]; *Mabb v. Stewart*, 133 Cal. 556, [65 Pac. 1085]; s. c. 147 Cal. 417, [81

Pac. 1073]; *Curtin v. Arroyo etc. Co.*, 147 Cal. 338, [81 Pac. 982]; *Arroyo etc. Co. v. Bequette*, 149 Cal. 546, [87 Pac. 10]; *Fuller v. Azusa I. Co.*, 138 Cal. 204, [71 Pac. 98]; *Spurgeon v. Santa Ana etc. Co.*, 120 Cal. 71, [39 L. R. A. 701, 52 Pac. 140]; *Hewitt v. San Jacinto etc. Irr. Dist.*, 124 Cal. 186, [56 Pac. 893]; *Goodell v. Verdugo etc. Co.*, 138 Cal. 310, [71 Pac. 354]; *Barton v. Riverside W. Co.*, 155 Cal. 518, [23 L. R. A. (N. S.) 331, 101 Pac. 790]; *Miller v. Imperial W. Co.*, 156 Cal. 27, [24 L. R. A. (N. S.) 372, 103 Pac. 227]. In none of them is there any suggestion that such disposition or distribution constitutes a public use. This method became so prevalent and so satisfactory, that in 1895 section 324 of the Civil Code was amended so as to provide that, in such cases, the by-laws might require the stock certificates to describe the land to which the stockholders' share of water was to be applied and that such stock should thereupon become appurtenant to such land.

This long continued understanding and application of this section of the constitution must be deemed to be a practical construction of it contrary to the theory of plaintiff. It was not intended to declare that specific sales of water, or transfers thereof to a particular person or persons chosen at the will of the holder of the supply, or the distribution thereof by private corporations among their stockholders for an agreed price and at annual rates fixed by the corporation itself, should be considered a dedication thereof to public use.

It would follow as a matter of course that neither the Development Company, nor either of the water companies organized by it, possesses the power of eminent domain. It is not asserted that either of them has ever claimed or attempted to exercise that power. The Mexican company has received from the Mexican government a grant of that power. But the fact that that company is carrying on a public service in Mexico and has devoted some water to public use there does not affect the water carried into the United States nor the character of the use thereof in California. Nor is the fact that it is all derived from the same source of any importance. A part of a stream, or a part of a single appropriation therefrom, may be devoted to public use and another part entirely to private use. (*Leavitt v. Lassen I. Co.*, 157 Cal. 83, [29 L. R. A. (N. S.) 213, 106 Pac. 404].)

Something is said in the argument in regard to the fact that the Development Company brings more water into California through its canal than is used, and that there is always some waste water discharged from the distributing canals or somewhere along the route and that this is more than enough to supply the plaintiff. There is generally some unavoidable waste in any large irrigating system. Water must be turned into canals leading to lands where it is to be used. The users may not be ready to commence taking it. As it cannot then be turned back and made to run up hill, it must be allowed to run down and go to waste, unless some independent user takes it below the waste gate. So much of the water as may be unavoidably wasted is to be deemed a part of that which is appropriated to the beneficial use and which the company has the right to take. It is necessary to the use and is in the same category as that lost in transmission by evaporation and unavoidable seepage.

So far as any other waste of the water is concerned, it is water to which the defendants have acquired no right. Their right is measured by the quantity which is put to beneficial use, by which is meant the quantity necessary to be taken from the source to supply that use at the place of use. The taking of more would be a taking without right. But the excess, if any, has not been applied by any of the defendants to any public use in California. The plaintiff, or any person, could appropriate such excess by an independent diversion from the Colorado River, and thereby prevent defendants from taking it. Until she does so she has no more right to it than the defendants have. Doubtless she is not in a position to do this, but the defendant is not a common carrier of water and it cannot be compelled to take it from the river for the benefit of plaintiff, carry it through Mexico for her and deliver it to her in California. The case, in this aspect, is one of apparent hardship, but the courts cannot compel such service. As a matter of general policy we doubt if it is important, for it is not likely that the waste will be allowed to continue, since the defendants could readily make a profitable use of it by increasing their capital stock and applying it to the additional lands to which it could thus be made available, without any change in their method of distribution. In any event,

the plaintiff has no rights to it which can be enforced by *mandamus*.

The judgment is reversed.

Beatty, C. J., does not participate in the foregoing decision.

Rehearing denied.

[L. A. No. 3209. Department One.—November 9, 1912.]

In the Matter of the Estate of COUN D. RANKIN, Deceased.

ESTATES OF DECEASED PERSONS—ASSIGNMENT OF INTEREST BY LEGATEE—MONEY COMING TO ASSIGNOR AS "HEIR AT LAW."—An assignment by a legatee and devisee under a will of certain money "which may be coming to me as an *heir at law of the said . . . deceased, under the terms of his will,*" will be construed as intended to transfer portions of the interest of the assignor as a "beneficiary under the will," coming to her "under the terms of" such will.

ID.—FOREIGN WILL—RIGHT TO LETTERS OF ADMINISTRATION WITH WILL ANNEXED—PERSONS INTERESTED IN WILL.—The article of the Code of Civil Procedure containing sections 1323 and 1324 deals especially with the subject matter of foreign wills, and must prevail over all conflicting provisions as to all matters and questions arising out of the subject matter of such article, and under its provisions letters of administration with the will annexed must be granted to a person interested in the will who applies for them, in the absence of a petition for letters by the executor.

ID.—ASSIGNEE OF NONRESIDENT LEGATEE UNDER FOREIGN WILL—PREFERENTIAL RIGHT TO LETTERS AS AGAINST PUBLIC ADMINISTRATOR.—An assignee of a nonresident legatee and devisee under a foreign will is a person "interested in the will," within the meaning of section 1323 of the Code of Civil Procedure, and by virtue of that fact alone, if competent to serve as administrator in this state, is entitled to letters of administration with the will annexed, in preference to one who, like the public administrator, is not "interested in the will." It is immaterial, so far as affects the right of the assignee to such letters, that the assignment was made to him without any consideration paid therefor.

APPEAL from an order of the Superior Court of Riverside County granting letters of administration with the will annexed. Paul J. McCormick, Judge presiding.

The facts are stated in the opinion of the court.

Purington & Adair, for Appellant.

Lafayette Gill, for Respondent.

ANGELLOTTI, J.—Deceased died testate on April 3, 1911, in Prince Edward Island, Canada, a resident of said island. By his will he gave all his property to his mother, Annie Rankin, a nonresident of this state, and appointed as executor one Arthur A. Bartlett, also a nonresident. A portion of his property consisted of an orange grove situate in Riverside County, California. His will was duly admitted to probate by the court of probate of wills of said island. Subsequently a copy of the will and the probate thereof, duly authenticated, was filed in the superior court of Riverside County by one W. C. Fraser, with a petition for its probate in this state and the issuance to him of letters of administration with the will annexed, he claiming to be a "person interested in the will," by virtue of certain assignments of interests in the estate made by said Annie Rankin, the sole devisee and legatee. The public administrator of Riverside County filed his opposition to the granting of such letters to Fraser and his petition for the issuance of such letters to himself. The trial court admitted the will to probate in this state, denied the application of the public administrator, and ordered the issuance of letters of administration with the will annexed to Fraser, as a person interested in the will. The assignments under which Fraser claimed were three in number, each being a written instrument made by said Annie Rankin as "the sole beneficiary under the will" of deceased, and each purporting to assign and transfer to said Fraser a specified sum of money "which may be coming to me as an heir at law of the said Coun D. Rankin, deceased, under the terms of his will." It was shown over the objection of Fraser that the same was immaterial, incompetent, and irrelevant, that no valuable consideration was paid by Fraser for any of said assignments.

This is an appeal by the public administrator from the order of the superior court, the only controversy being as to

the respective rights of Fraser and the public administrator to letters of administration with the will annexed.

It is urged that nothing passed to Fraser by virtue of any of the assignments because of the phraseology thereof, each of them being of money "which may be coming to me as an *heir at law*" of deceased, and Mrs. Rankin taking solely as devisee and legatee. This construction of the assignments is too technical. It is impossible to fairly construe the instruments otherwise than as intended to transfer portions of the interest of Mrs. Rankin as "beneficiary under the will," coming to her "under the terms of" the will of deceased.

It is immaterial so far as the public administrator is concerned that nothing of value was paid by Fraser for any of the assignments. Mrs. Rankin of course had the right to give any portion of her interest under the will to Fraser if she saw fit to do so, and the public administrator could not be heard to question the effect of the assignments either on the ground that the same constituted mere gifts, or that a consideration recited was not in fact paid.

The situation in regard to the assignments being as we have stated, the action of the trial court in awarding letters of administration with the will annexed to Fraser as against the public administrator was correct, in view of the decisions of this court.

Section 1323 of the Code of Civil Procedure contained in the article relative to probate of foreign wills provides "when a copy of the will, and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters," it shall be filed, and that after proper notice and proofs there shall be "letters testamentary or of administration issued thereon." It was squarely decided in *Estate of Bergin*, 100 Cal. 376, [34 Pac. 867], in a contest for letters of administration between the public administrator and a resident devisee under a foreign will, the executor named in the will failing to apply for letters testamentary, that the devisee was entitled to letters of administration with the will annexed, as a "person interested in the will," in preference to the public administrator. The court said that the article containing sections 1323 and 1324 of the Code of Civil Procedure dealt especially with the subject matter of foreign

wills, and must prevail over all conflicting provisions "as to all matters and questions arising out of the subject matter of such article," and that it was clear that under its provisions letters of administration "must be granted to a 'person interested in the will' who applies for them, in the absence of a petition by the executors." In *Estate of Engle*, 124 Cal. 292, [56 Pac. 1022], a contest for letters of administration with the will annexed between the assignee of an undivided interest in certain property of the estate from the sole devisee, and a public administrator, it was held that the assignment vested in the assignee all the interest that the devisee had by virtue of being the owner of such undivided interest, and made him a person interested in the will within the meaning of section 1323 of the Code of Civil Procedure, and that he was entitled to letters of administration with the will annexed as a person interested in the will, in preference to the public administrator. There has been no change in our law material to the question presented since these decisions were rendered, and there is no decision impairing the effect of the rulings made in the cases just cited.

In *Estate of Richardson*, 120 Cal. 344, [52 Pac. 832], it is true that it was held that the superior court had the right, under the circumstances of that case, to appoint the public administrator. The contest there was between the nominee of both the absent executor and a devisee not competent to administer, and the public administrator, and it was simply held, as stated in the syllabus, that "in default of application therefor by such executor, or by a devisee resident in this state, who is entitled to act as administrator, there is no statutory provision requiring the court to appoint the nominee of such executor or of any resident devisee." In *Estate of Coan*, 132 Cal. 401, [64 Pac. 691], the contest was between a son and a daughter of deceased, each competent to administer and each interested in the will as devisee or legatee. It was held that section 1350 of the Code of Civil Procedure, requiring that where no executor is named in the will, or if the executor named is dead, or incompetent, or renounce or fail to apply for letters, "letters of administration with the will annexed must be issued as designated and provided for in granting of letters in case of intestacy," and section 1365 of the Code of Civil Procedure, prescribing the order in which

letters must be granted in case of intestacy, are applicable in the matter of a foreign will "where, as in this case, the controversy as to who shall administer is between parties *interested in the will.*" This may well be for the reason that there is no conflicting provision in the article on probate of foreign wills, that article controlling, as said in *Estate of Bergin*, 100 Cal. 376, [34 Pac. 867], where there is any special provision thereof in conflict with a provision in another article. In *Estate of Coan*, 132 Cal. 401, [64 Pac. 691], *Estate of Engle*, 124 Cal. 292, [56 Pac. 1022], and *Estate of Bergin*, 100 Cal. 376, [34 Pac. 867], were expressly distinguished from the case under consideration, as involving a contest for letters "between one interested in the will and the public administrator." *Estate of Brundage*, 141 Cal. 538, [75 Pac. 175], contains nothing in conflict with the views declared in *Estate of Bergin*, 100 Cal. 376, [34 Pac. 867], and *Estate of Engle*, 124 Cal. 292 [56 Pac. 1022]. In that case, the person held by this court to be entitled to letters was a resident son of the deceased, who was a devisee and legatee under the will, a person interested in the will. The other party, a corporation authorized to act as administrator, was the nominee of the nonresident executor, the nominee of nonresident heirs and legatees, who by reason of their nonresidence were incompetent to act as administrator, and the assignee of a portion of the legacy of one of the nonresident daughters. It was held in accord with previous decisions that neither the nomination by the nonresident executor, nor the nomination by any heir, devisee, or legatee not himself competent to serve as administrator, or "entitled" to administration, gave the nominee any right. As to the claim that such party was entitled to have its claim considered by reason of the fact that it was the assignee of a portion of a daughter's legacy, the answer was practically that as such assignee it could occupy no better position than its assignor, the nonresident daughter, if she were a resident of the state, that in such event the contest would be one between two parties "interested in the will," and that the son must be preferred to the daughter under the rule declared in *Estate of Coan*, 132 Cal. 401, [64 Pac. 691]. The proposition that as against a person "interested in the will," the public administrator is not "entitled" to

letters of administration in the case of a foreign will was referred to in the opinion as being a "well settled proposition," and it was stated that this rule is apparently based upon the fact that he is not "interested in the will." None of the other cases cited by learned counsel for appellant requires notice.

From what we have said it is clear that it is the well established rule in California that in the case of a foreign will, a person "interested in the will" is by virtue of that fact alone, if competent to serve as administrator in this state, entitled to letters of administration with the will annexed as against one who, like the public administrator, is not "interested in the will." This is the effect of sections 1323 and 1324 of the Code of Civil Procedure, as construed by this court in the cases we have cited.

The order appealed from is affirmed.

Shaw, J., and Sloss, J., concurred.

[Crim. No. 1734. In Bank.—November 9, 1912.]

THE PEOPLE, Respondent, v. DONG POK YIP,
Appellant.

CRIMINAL LAW—ASSAULT WITH INTENT TO COMMIT INFAMOUS CRIME AGAINST NATURE—WANT OF CONSENT ESSENTIAL TO ASSAULT.—An assault with the intent to commit the infamous crime against nature implies repulsion, or at least want of consent on the part of the person assaulted, and where such want of consent is shown, the fact that the defendant was interrupted and his attempt rendered abortive did not make his conduct any the less criminal.

ID.—AGE AND MENTALITY OF PERSON ASSAULTED—ASSAULT ON YOUNG CHILD.—In such a case the age and mentality of the person assaulted is important and should always be considered in determining the presence or absence of consent, and the mere submission of a child of tender years or retarded mental development to an attempted outrage of his person should not, in and of itself, be construed to be such a consent as would, in point of law, justify or excuse the assault.

ID.—DIFFERENCE BETWEEN SUBMISSION AND CONSENT.—There is a decided difference in law between mere submission and actual consent.

XConsent, in law, means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice, to do something proposed by another. It differs very materially from assent and implies some positive action and always involves submission. Assent means mere passivity or submission which does not include consent.

Id.—EVIDENCE—SUPPORT OF CONVICTION OF LESSER OFFENSE.—Where the evidence clearly would support a verdict for a higher offense, the conviction of a lesser crime necessarily included therein will not be set aside.

Id.—CONVICTION OF SIMPLE ASSAULT.—Where the evidence is sufficient to support a conviction of an assault with the intent to commit the infamous crime against nature, a conviction of a simple assault will be upheld.

Id.—SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION OF AN ATTEMPT. It is not true as a rule of law that evidence which is insufficient to sustain a conviction for a crime would be insufficient to sustain a conviction for an attempt to commit the crime.

Id.—CROSS-EXAMINATION OF PERSON ASSAULTED—STATEMENTS BY DEFENDANT.—On a trial for such offense, where the child alleged to have been assaulted was called as a witness for the defendant and gave his version of the occurrence, anything that the defendant may have said at the time became relevant and material and admissible in evidence on cross-examination, and the fact that the conversation narrated by the witness disclosed a statement of the defendant prejudicial to him and irrelevant to the issue being tried, did not render its admission erroneous.

APPEAL from a judgment of the Superior Court of Contra Costa County and from an order refusing a new trial. R. H. Latimer, Judge.

The facts are stated in the opinion of the court.

Carroll Cook, and Charles Stewart, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, for Respondent.

THE COURT.—Defendant was tried upon a charge of assault with intent to commit the infamous crime against nature, and was convicted of simple assault. He appeals from the judgment and from an order denying his motion for a new trial.

The alleged victim of the assault was a boy nine years of age. The only evidence given with reference to the episode which culminated in the defendant's arrest was furnished by one Rodrigues, bookkeeper for a certain transportation company at Antioch, and by the boy who was called as a witness by the defendant. Mr. Rodrigues testified that from his office on the wharf he saw the boy and the Chinaman, Dong Pok Yip. The latter had been fishing and the former had been playing with another lad, but after a time the witness observed them seated together and the Chinaman was teaching the boy how to fish. Subsequently he noticed the boy fishing while the defendant, who had his arm around the child, was whispering to him. This attracted the particular attention of Mr. Rodrigues, who watched the two from the door of his office. As he was thus observing them the Chinaman arose; helped the boy to his feet; and they walked hand in hand along the wharf, but as they passed the office they were not holding hands. The boy seemed to the witness to be going willingly, and the latter observed no coercion of any sort on the part of the Chinaman. A few minutes later the witness followed in the direction taken by the boy and the defendant. He found them near an oil tank in some brush, which was about a foot in height in the direction from which he was looking, but high enough to screen them from any one who might look from the opposite side. They were both stooping, the boy, who faced Rodrigues, was in front of the defendant, with his back to the latter, and defendant had his hands on the sides of the boy's waist. Rodrigues did not see the lad's person, but he did observe that the back of the boy's overalls hung down and that the Chinaman's trousers were unbuttoned in front. When they saw Rodrigues they quickly changed their positions, the boy slipping one of the suspenders of his "bib overalls" over his shoulder and the Chinaman fastening the top button of his trousers. When they were thus seen by Rodrigues near the tank the Chinaman had his hands on the boy's sides. While the little fellow was evidently not a child of even ordinary intelligence, the learned judge of the superior court who presided at the trial, after a very careful examination, permitted him to be sworn as a witness. There were some contradictions in his testimony, but he declared that the defendant had not at-

tempted to do anything to him. He also said that during all of the time he was with the defendant near the oil tank, they were facing each other. He also testified that the defendant used no force with him and did not take hold of him roughly. According to his testimony the Chinaman had made a disgusting proposal with reference to the boy's sister, coupled with a promise to give her money, and had exposed his person to the boy.

Appellant's contention is that since the verdict of the jury acquitted the defendant of the higher offense charged in the information, there is no evidence showing an intent on his part to commit any other sort of assault; and that although very slight physical force is sometimes sufficient to uphold a conviction of assault where a higher crime has been charged, the physical violence is measured by the outrage to the victim's feelings and its use in opposition to the will of that person; and in this case, the boy being a consenting party, there was no violence to his feelings and therefore no assault. The fallacy of this argument lies in the failure to consider the youth and the weak mentality of the child. When the case was before the district court of appeal that court sustained the conviction, and in the opinion, Mr. Presiding Justice Lennon, discussing the matter of consent, said, among other things:

"The fact that the defendant was interrupted and his attempt rendered abortive by the sudden and unexpected intrusion of a third party did not make his conduct any the less criminal. (*People v. Johnson*, 131 Cal. 512, [63 Pac. 842].) This of course assumes that the evidence in the case shows an absence of consent on the part of the boy; for it must be conceded, as contended by counsel for the defendant, that an assault implies repulsion, or at least want of consent on the part of the person assaulted (*People v. Gordon*, 70 Cal. 468, [11 Pac. 762]; 2 Bishop's New Criminal Law, sec. 35); and if it could be fairly said that the evidence in the present case compelled the conclusion that the boy knowingly consented to the commission of the crime charged against the defendant, there would be no escape from a reversal of the judgment. We are of the opinion, however, that the evidence upon the whole case falls short of showing that the boy actually and knowingly consented to

be the victim of the alleged assault. It may be admitted that the evidence shows that the boy was ignorantly indifferent and passive in the hands of the defendant, even to the point of submission; but there is a decided difference in law between mere submission and actual consent. Consent, in law, means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice, to do something proposed by another. 'Consent' differs very materially from 'assent.' The former implies some positive action and always involves submission. The latter means mere passivity or submission, which does not include consent. (*Geddes v. Bowden*, 19 S. C. 1, 7; *Aull v. Columbia N. & L. R. Co.*, 42 S. C. 431, [20 S. E. 302]; *Bouvier's Law Dict.*) In cases of the character under discussion, the age and mentality of the subject of an indecent assault is important, and should always be considered in determining the presence or absence of consent. The mere submission of a child of tender years or retarded mental development to an attempted outrage of its person should not, in and of itself, be construed to be such consent as would, in point of law, justify or excuse the assault. (2 *Bishop's New Criminal Law*, sec. 35, subd. 2.) It is neither unreasonable nor unnatural to assume that such a child, in the hands of a strong man, might be easily overawed into submitting without actually consenting. (*Hill v. State*, 37 Tex. Cr. 279, [66 Am. St. Rep. 803, 38 S. W. 987, 39 S. W. 666].) In the case at bar the jury was properly instructed by the trial court that if the boy consented to the assault complained of the defendant should be found not guilty. Presumably the jury, in its deliberations, heeded this instruction, but upon weighing the evidence concluded, justly, we think, that the boy victim of the assault merely submitted to the act attempted by the defendant without knowing the nature of the act or realizing the design of the defendant."

These views are, in our opinion, correct and are hereby adopted by this court.

If the jury had found the defendant guilty under the evidence presented of assault with intent to commit the infamous crime against nature, we would have been compelled to sustain the judgment. The testimony revealed the fact that the defendant had first secured the confidence of the child

by giving him some instruction in the art of fishing; that he had then led the little fellow to a secluded place such as would be selected for the commission of the crime charged; that he had then induced the boy to take a position and he himself had assumed an attitude which clearly indicated his indecent purpose; that previously he had exposed his own person; and that the child's clothing had been disarranged in a manner which comported with the theory of the prosecution regarding the defendant's intent. All of this, coupled with the lack of consent on the part of the little boy, as discussed above, was sufficient to support a verdict of guilty of assault with intent to commit the infamous crime against nature. Where the evidence clearly would support a verdict for a higher offense, the conviction of a lesser crime necessarily included therein will not be set aside. (*People v. Muhlner*, 115 Cal. 306, [47 Pac. 128].) The only acquittal in this case was of the major crime charged, but this, as the attorney-general says in his brief, did not "include an acquittal of an intent to take indecent liberties or to practice other lewd and lascivious acts or to commit any other unlawful act such as may constitute an assault." We conclude, therefore, that the conviction of simple assault must be sustained under the evidence in this case. Nothing said by this court in *People v. Stouter*, 142 Cal. 146, [75 Pac. 780], conflicts with the conclusion reached here. In that case the defendant had been found not guilty of the crime defined by section 288 of the Penal Code, but had been convicted of an attempt to commit said offense. It was held that the superior court erred in giving an instruction after the jury had been out many hours, by which they probably inferred the judge's belief that the defendant should be convicted of an attempt to commit the crime alleged. This court also said: "Moreover, if the evidence was not sufficient to convict the defendant of the act charged—and the jury so found—it is difficult to see how it was sufficient to find him guilty of an attempt to commit that act. The child herself testified that defendant did not do the act charged in the information; and if a certain condition of her person, claimed by the prosecution to have been proved, and other circumstantial evidence, did not warrant the jury to find defendant guilty of doing the act charged, it was not sufficient to support a verdict of guilty of an attempt to do that act. The jury

evidently must have considered the last instruction as giving them a wide power to find the defendant guilty of something, under the general category of an attempt to do the act charged in the information." The language quoted above must be limited to the facts of that case, which, by the way, are not reviewed extensively in the opinion. It is not true as a rule of law, nor did the court say in the Stouter case that evidence which is insufficient to sustain a conviction for a crime would be insufficient to sustain a conviction for an attempt to commit the crime.

Upon the only other important ruling assigned as error by appellant we adopt the opinion of the district court of appeal:

"Upon cross-examination of the boy the district attorney asked, 'What did the Chinaman do at that time?' The witness started his answer by attempting to repeat what the defendant said, whereupon counsel for defendant interrupted with the objection that whatever the defendant may have said was not cross-examination. Upon the objection being overruled the completed answer revealed the fact that the defendant had offered two dollars for an opportunity of meeting and 'doing something' to the boy's sister. It is now claimed that this testimony was hearsay, and that the objection made at the trial that it was not cross-examination should have been sustained. Obviously what the defendant did, including what he said, was not hearsay, and in view of the direct examination it was clearly cross-examination. Anything that the defendant may have said which was relevant and material to the commission of the offense was admissible in evidence; and as the trial court could not know and had no reason to anticipate the answer of the witness the objection was properly overruled. Under such circumstances the fact that the witness narrated a conversation of the defendant which disclosed a statement of the defendant prejudicial to him and irrelevant to the issue being tried, did not make the ruling erroneous. In such a contingency the defendant might have availed himself of a motion to strike out the answer, but not having done so he will not now be heard to complain."

The judgment and order are affirmed.

Beatty, C. J., does not participate in the foregoing decision.

[Sac. No. 1983. In Bank.—November 12, 1912.]

MARCUS PURCELL, Appellant, v. R. M. RICHARDSON,
Respondent.

JUSTICE'S COURT—PLEADINGS OF DEFENDANT—CROSS-COMPLAINT NOT AUTHORIZED.—No such pleading as a cross-complaint is provided for among the pleadings available to a defendant in an action in a justice's court. Under section 852 of the Code of Civil Procedure, the only pleadings available to a defendant are a demurrer or answer to the complaint.

ID.—CROSS-COMPLAINT LIMITED TO ACTIONS IN SUPERIOR COURT.—The provisions of section 442 of the Code of Civil Procedure, specifically providing for a cross-complaint in actions in the superior court, are not applicable to actions in a justice's court. That code, having particularly designated of what the pleadings in such court shall consist and what they shall contain, is conclusive on the subject.

ID.—ANSWER SETTING UP NEW MATTER AS COUNTERCLAIM—ABSENCE OF NOTICE OF TRIAL—VOID JUDGMENT.—A pleading of the defendant, setting up new matter by way of counterclaim, as provided by section 855 of that code, was simply an answer, which when filed raised an issue of fact to be tried under notice given by the justice to the respective parties to the action. The justice was without jurisdiction to enter any judgment at all until after such notice of the trial had been given, and, in the absence of such notice, an attempted judgment entered by him against the plaintiff and in favor of the defendant, on the new matter pleaded as a counterclaim, was void.

APPEAL from an order of the Superior Court of Siskiyou County denying a petition for a writ of mandate. James F. Lodge, Judge.

The facts are stated in the opinion of the court.

Marcus Purcell, *in pro. per.*, for Appellant.

R. S. Taylor, and Taylor & Tebbe, for Respondent.

LORIGAN, J.—Appellant filed a petition in the superior court of Siskiyou County for a writ of mandate to compel the defendant as justice of the peace of Lake Township in said county to issue an execution from his court on a judgment entered therein in favor of appellant and against one

A. A. Atkinson. An alternative writ was issued which respondent answered, and on the hearing an order was made by the superior court denying the petition. From this order an appeal was taken to the district court of appeal for the third district which affirmed the judgment of the superior court.

The matter is here on an order of this court granting a further hearing.

- It appears from the record that on July 13, 1910, Atkinson brought suit in said justice's court against the petitioner Purcell to recover the sum of nine dollars, the value of services alleged to have been rendered the latter by Atkinson as a physician. On July 18, 1910, Purcell filed a pleading in that action which he denominated an "answer, demurrer and counterclaim" wherein he demurred to the complaint, denied the alleged indebtedness, and "by way of counterclaim" alleged negligence on the part of Atkinson in prescribing treatment for him as his physician and claimed that he had suffered damage thereby in the sum of \$272. On July 28, 1910, Purcell applied to said justice for the entry of a judgment in his favor under that portion of his pleading filed as a "counterclaim" upon the theory that while so denominated it was in legal effect a "cross-complaint" which the plaintiff Atkinson having failed to answer entitled him to a judgment by default against said Atkinson on the cross-complaint. The justice accorded with this claim on the part of Purcell and entered a judgment by default against Atkinson for the full amount of damages claimed—\$272 and costs. Subsequently, on August 8, 1910, the justice, on motion of Atkinson and after notice to Purcell, set the aforesaid judgment aside and fixed September 15, 1910, as the date for the trial of the cause. On September 3, 1910, Purcell filed a written demand upon the said justice for the issuance of an execution on the said judgment so entered against Atkinson. The justice refused to issue it, and this proceeding in mandate was thereupon commenced by Purcell to compel its issuance.

The position of appellant on this appeal is that while his pleading was denominated a "counterclaim," still his denomination of it as such is of no consequence; that it is the facts set up in the pleading, and not what the pleader may call it,

which determines its character, and that so tested, the facts set up therein constitute it a "cross-complaint" and not a "counterclaim"; that the failure to answer said cross-complaint in due time entitled appellant to the judgment in his favor against Atkinson which was entered by the justice; and that the attempt subsequently by the justice of the peace under section 859 of the Code of Civil Procedure to set aside this judgment was beyond his jurisdiction, and the order doing so was void because no affidavit of merits had been filed as by the section it is provided must be done. In this view and insisting that the judgment by default is a valid judgment it is claimed that it was the duty of the justice to have issued the execution thereon when demanded and that it was error on the part of the superior court to have denied appellant a writ of mandate to compel the justice to do so.

It is unnecessary to determine anything respecting the order of the justice setting aside the judgment. We deem this matter immaterial because we are satisfied that the judgment by default itself, entered by the justice, and upon which appellant relies, was clearly void as beyond the jurisdiction of the justice to enter it. It was entered by him on the theory that the facts set forth in that portion of the answer filed by appellant and which he denominated a counterclaim constituted it in legal effect a cross-complaint. But this theory of the justice was erroneous for the clear reason that there is no such pleading as a cross-complaint provided for among the pleadings available to a defendant in a justice's court. The provisions of the Code of Civil Procedure relative to pleadings in those courts prescribe specifically of what they shall consist, and those available to a defendant consist of a right to demur or answer the complaint. (Code Civ. Proc., sec. 852.) As to the answer, it is provided that it "may contain a denial of any or all of the material facts stated in the complaint . . . and also a statement . . . of any other facts constituting a defense or counterclaim upon which an action might be brought by the defendant against the plaintiff or his assignor in the justice's court." (Sec. 855.) It is quite apparent from a simple reading of this last section that no such pleading as a cross-complaint in a justice's court is permitted. Appellant has apparently

sought to invoke in aid of the right to set up a cross-complaint in a justice's court the provisions of the Code of Civil Procedure which apply to actions in the superior court and where the filing of a cross-complaint is specifically provided for. (Code Civ. Proc., sec. 442.) But that section has no application to pleadings in the justices' courts. While it is true that by section 925 of the Code of Civil Procedure those provisions of that code which in their nature are applicable to proceedings in justices' courts are made applicable thereto, this section cannot be extended to authorize other pleadings to be filed therein than those specifically enumerated as being permitted in justices' courts. The code having particularly designated of what the pleadings in such court shall consist and what they shall contain, is conclusive on the subject.

In this view the pleading filed by appellant in the justice's court amounted simply to an answer; the only pleading which he was allowed to file and in which, under section 855, he was permitted in addition to a denial of the allegations of the complaint to set up any facts constituting a defense or counterclaim. As a matter of pleading in the justice's court the facts set forth in the answer of appellant could only be treated as a counterclaim, and as such the plaintiff in that action was not called upon to file any answer respecting it. It constituted an allegation in the answer of new matter which was deemed controverted. Under section 880 of the Code of Civil Procedure applicable to justices' courts, when the answer of the appellant was filed, an issue of fact arose as to all allegations in the complaint controverted by the answer and "upon any new matter in the answer." Upon such issue being made it was the duty of the justice to fix a day for the trial of the action and to give notice thereof to the parties. Proceeding, however, on the theory that the matter set forth by appellant in his answer in the justice's court constituted a cross-complaint, the justice entered judgment by default against Atkinson without any notice of the trial being given. As pointed out, this construction of the pleading on the part of the justice was erroneous. The pleading was simply an answer setting up new matter by way of counterclaim under section 855, which when filed raised an issue of fact to be tried under notice given to the respective parties to the action. The justice was without juris-

dition to enter any judgment at all in the case before him until after such notice of the trial had been given, and as, of course, no notice was given the judgment entered by him against Atkinson in favor of the appellant was void. (*Jones v. Justice's Court*, 97 Cal. 523, [32 Pac. 575]; *Elder v. Justice's Court*, 136 Cal. 364, [69 Pac. 1022].)

In this view, as the judgment entered by the justice was void, the refusal of the superior court to grant a writ of mandate in favor of petitioner to compel the issuance of an execution thereon was correct and the order denying the writ is affirmed.

Angellotti, J., Sloss, J., Melvin, J., Shaw, J., and Henshaw, J., concurred.

[L. A. No. 3345. In Bank.—November 13, 1912.]

PACIFIC ELECTRIC RAILWAY COMPANY, Petitioner,
v. EDWARD ROLKIN et al., as Members of the State
Board of Equalization of the State of California, Re-
spondents.

TAXATION—ASSESSMENT BY STATE BOARD OF EQUALIZATION OF OPERATIVE PROPERTY OF RAILROAD—PROTEST BY CITY ASSESSOR—LIMITATION OF TIME TO MAKE PROTEST—MANDAMUS.—Under the provisions of the act of 1911 (Stats. 1911, p. 538), any protest by a city assessor against the taxation by the state board of equalization of certain property of a railroad company as operative property must be filed within thirty days after his receipt of the company's report, which that act requires to be served on him. Such requirement is jurisdictional, and a protest filed later has no effect, and does not require the state board to revise or alter its action in placing such property on the assessment-roll as operative property, or to dispose of the protest in any way. Its failure to make any order disposing of a belated protest is not a breach of duty, and *mandamus* will not lie to compel the entry of such order.

APPLICATION for a Writ of Mandate, instituted by the petitioner, a corporation organized under the laws of the state of California and engaged in maintaining and operating an electric railroad system within the city of Los An-

geles and between that city and other cities in the state of California, against the state board of equalization, directing that board to make and enter an order in the minutes of the board to the effect that certain articles of personal property, that had been assessed on the assessment-roll of the city of Los Angeles for the fiscal year 1912, as nonoperative property, was operative property of said railroad. The petitioner had, on the — day of March, 1912, filed with the city assessor of the city of Los Angeles, a duplicate of its report covering the property in question, and describing the same as operative property. On May 7, 1912, the city assessor of the city of Los Angeles, filed a protest with the state board of equalization against the inclusion of such property in that board's assessment of the operative property of the petitioner. On May 19, 1912, the property in question, together with other operative property of the petitioner, was assessed by the state board of equalization and was placed by it upon the roll of operative property for taxation for state purposes. The further facts are stated in the opinion of the court.

J. W. McKinley, and A. W. Ashburn, Jr., for Petitioner.

U. S. Webb, Attorney-General, Raymond Benjamin, Chief Deputy Attorney-General, John W. Shenk, City Attorney of Los Angeles, and Myron Westover, Deputy City Attorney, for Respondents.

THE COURT.—The city assessor of Los Angeles did not file any protest against the taxation of the property in question as operative property of the Pacific Electric Railway Company until more than thirty days after he had received the copy of the company's report which the law requires to be served upon him. The provision of the statute (Stats. 1911, p. 538) that such protest shall be filed within thirty days thereafter is jurisdictional. A protest filed later has no effect, and does not require the state board to revise or alter its action in placing such property on the roll as operative property, or to dispose of the protest in any way. Its failure to make any order disposing of the protest is, therefore, not a breach of duty and *mandamus* will not lie to com-

pel the entry of such order. Its act placing such property on the roll as operative property is as valid as if the belated protest had not been filed.

For these reasons the application for a writ of mandate is denied.

Rehearing denied.

[L. A. No. 2972. Department One.—November 14, 1912.]

POSTAL TELEGRAPH-CABLE COMPANY (a Corporation), Respondent, v. CITY OF LOS ANGELES (a Municipal Corporation), Appellant.

TAXATION—DESCRIPTION OF PROPERTY—STATE FRANCHISE OF TELEGRAPH COMPANY.—An assessment upon property described as the “franchise of the Postal Telegraph-Cable Company in the city of Los Angeles,” is to be deemed to refer solely to its state franchise in the streets of that city, and not to its federal nontaxable franchise under the act of Congress of July 24, 1866, and is a sufficient description of the state franchise.

ID.—FEDERAL FRANCHISE OF TELEGRAPH COMPANY—RIGHT OF OCCUPANCY OF PUBLIC HIGHWAYS—ASSESSABILITY OF STATE FRANCHISE—SITUS OF FRANCHISE.—The franchise granted by the act of Congress of July 24, 1866, does not give a telegraph company an unencumbered right to occupy the highways of the state by its poles and wires. Such right is subject to charges which may be imposed by the state for such occupancy and use of its public ways; and if the state grants the right to such company to use such part of the highways without compensation, such right is a privilege which is nothing more nor less than a franchise in such highways, having a local situs and assessable in each city or county in which such highways are situated.

ID.—OFFER BY STATE IN SECTION 536 OF CIVIL CODE—ACCEPTANCE BY TELEGRAPH COMPANY.—Section 536 of the Civil Code constitutes a continuing offer by the state to all telegraph companies of the right to use without compensation such portions of the streets of any city as may be necessary or convenient for the operation of their lines, and when such company accepts this offer by placing and maintaining its poles and wires in, along, and over said streets, it thereby acquires from the state a right in the part of the streets so exclu-

sively occupied, which right is a taxable franchise, and distinct and separate from the federal franchise.

Id.—PLEADING—AVERMENT SHOWING ACCEPTANCE OF STATE FRANCHISE—ERRONEOUS LEGAL CONCLUSIONS.—An averment in a complaint by a telegraph company of the physical fact that it is and has been maintaining and operating its lines of telegraph through and over the public highways of a municipality establishes, as a matter of law and of fact, the proposition that it has accepted and owns the state franchise for that purpose which was offered it by section 536 of the Civil Code. Additional averments that it was so doing solely by virtue of its federal franchise and that it has no franchise from the state, are merely erroneous conclusions of law.

Id.—FINDING THAT ALLEGATIONS OF FACT ARE TRUE—LEGAL CONCLUSIONS NOT FOUND.—A finding that the allegations of fact in a complaint are true, is not a finding that any conclusions of law therein are true.

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Monroe, Judge.

The facts are stated in the opinion of the court.

John W. Shenk, City Attorney of Los Angeles, E. R. Young, Assistant City Attorney, and Myron Westover, Deputy City Attorney, for Appellant.

Hunsaker & Britt, for Respondent.

SHAW, J.—The object of this action was to recover the sum of \$625 paid by plaintiff, under duress, in discharge of city taxes of 1907, alleged to have been illegally assessed against the defendant upon certain of its property which, it is claimed, was not subject to taxation by said city. The validity of the plaintiff's claim depends on the question whether or not the property was thus subject to taxation. The defendant appeals upon the judgment-roll alone.

The assessment shows that it was made upon property of the defendant described as "franchise of the Postal Telegraph-Cable Company in the city of Los Angeles." Respondent claims that it has no franchise within the city of Los Angeles, except a federal franchise under the act of Congress of July 24, 1866, to operate and maintain telegraph lines over the military and post roads of the United States.

It is conceded by the city that the streets of Los Angeles are military and post roads of the United States, that the plaintiff has a franchise from the United States under said act to operate telegraph lines thereon, and that said franchise is not taxable for local, state, or municipal purposes. The position of the counsel for the city is that the plaintiff, in addition to its federal franchise, owns and is in the use of a franchise from the state of California to operate its telegraph lines over said streets, and that it is this state franchise, and not the federal franchise, which is described in said assessment.

If, under the facts as found by the court, plaintiff owns a state franchise in said streets, then, under the decisions of this court in *Western U. T. Co. v. Los Angeles Co.*, 160 Cal. 124, [116 Pac. 564], and *Postal T. C. Co. v. Los Angeles Co.*, 160 Cal. 129, [116 Pac. 566], the description given in said assessment is to be deemed to refer to that franchise alone and not to the federal nontaxable franchise, and it is a sufficient description of the state franchise. The descriptions held sufficient in those cases were in the words: "right to occupy the streets of the city of Los Angeles." It was held that it would not be assumed, from the face of the description, that the assessor thereby intended to describe the nontaxable federal franchise, but, on the contrary, that he intended to refer only to the state franchise which he had the power to assess. A "right to occupy the streets" is a franchise. There is no material difference between the language of the descriptions in those cases and that in the case at bar, and the same reasoning applies.

The finding is that "the allegations of fact contained in plaintiff's complaint are true." It is contended that these allegations of the complaint show that the plaintiff did not own any state franchise, but was operating its lines in the city solely under its federal franchise. This claim is not supported by the allegations of fact referred to. After describing the federal franchise, the complaint alleges that "under and by virtue of such federal franchise, and not otherwise, plaintiff has been for many years last past, was on the first Monday of March, 1907, and still is, constructing and maintaining and operating lines of telegraph through and over the public roads and highways of the city of Los

Angeles," that all said lines in said city are maintained and operated only through and over public highways which have been declared post roads by act of Congress, and that "plaintiff has not now, and never had, any franchise of any kind or description for any purpose whatever from the state of California," or from any political or municipal incorporation thereof. The controlling fact here averred is that the plaintiff is, and was at the time of the assessment, maintaining and operating its telegraph lines through and over the streets of Los Angeles. It is now the settled law of this state that the franchise granted by the act of Congress aforesaid does not give the Telegraph Company an unencumbered right to occupy the highways of a state by its poles and wires, but that the right is subject to charges which may be imposed by the state for such occupancy and use of its public ways, and that if the state grants the right to such company to use such part of the highways without compensation, such right is a privilege which is nothing more nor less than a franchise in such highways, a franchise having a local situs and assessable in each city or county in which such highways are situated. (*Western U. T. Co. v. Hopkins*, 160 Cal. 106, [116 Pac. 557]; *Western U. T. Co. v. Los Angeles Co.*, 160 Cal. 124, [116 Pac. 564]; *Postal T. Co. v. Los Angeles*, 160 Cal. 129, [116 Pac. 566].)

It is also settled by these cases that section 536 of the Civil Code constitutes a continuing offer by the state to all telegraph companies of the right to use without compensation such portions of the streets of any city as may be necessary or convenient for the operation of its lines, that when such company accepts this offer by placing and maintaining its poles and wires in, along, and over said streets, it thereby acquires from the state a right in the parts of the streets so occupied, which right is a taxable franchise, and distinct and separate from the federal franchise. The parts of the streets so taken are in the exclusive occupancy of the company. The state and the public are excluded therefrom and cease to use such portions for ordinary highway purposes. The company which erects its poles and wires in the streets of a city in this manner, by permission of the state so given, cannot lawfully claim or maintain that it does this solely under and by virtue of the federal franchise, or that it has

no franchise from the state. The statement by the plaintiff of the physical fact that it is and has been maintaining and operating its lines of telegraph through and over the public highways of the city of Los Angeles establishes, as a matter of law and of fact, the proposition that it has accepted and owns the state franchise for that purpose which was offered to it by section 536. The state cannot deny that this right is vested in the company, nor can the company dispute it while admitting and averring that it is using the streets as a place for its poles and wires. The additional averments of the complaint that the plaintiff does this solely by virtue of the federal franchise and that it has no franchise from the state, are nothing more than conclusions, and in view of the other facts stated they are mere erroneous conclusions of law. The finding that the allegations *of fact* in the complaint are true, is not a finding that any conclusions of law therein are true, much less that these unfounded conclusions are true. It follows that the tax was lawfully assessed upon property lawfully taxable and that plaintiff had no right to demand reimbursement.

The judgment is reversed.

Angellotti, J., and Sloss, J., concurred.

Hearing in Bank denied.

[S. F. No. 5883. Department One.—November 15, 1912.]

RALPH W. HART, Respondent, v. C. F. BUCKLEY,
Appellant.

EMPLOYMENT OF ARCHITECT—DISMISSAL WITHOUT CAUSE—ENTIRE CONTRACT—ACTION FOR SERVICES ON QUANTUM MERUIT.—An architect employed to prepare the plans and specifications and to superintend the construction of an entire building, under a contract whereby he was to be paid a certain percentage of its cost, upon being discharged, without cause, by his employer during the term of his employment, may maintain an action upon the *quantum meruit* for the value of the services performed.

Id.—DISCHARGE OF EMPLOYEE DURING TERM OF EMPLOYMENT—RESCISION OF CONTRACT.—It is a general rule that where an employee is, without cause, discharged by his employer during the term of his employment, he may regard the contract as rescinded and sue upon a *quantum meruit* and recover the reasonable value of his services, as if the contract of employment had never been made.

Id.—DAMAGE RESULTING FROM NEGLIGENCE OF ARCHITECT—COUNTERCLAIM—INSTRUCTIONS.—In such action by the architect, the employer is entitled, in support of a counterclaim pleaded in his answer, to have the jury instructed that if they should find that the contractor for the building carelessly did certain work in an unworkmanlike manner and not in conformity with the specifications, and that plaintiff carelessly failed to properly inspect or test the work and carelessly certified that it was done properly and as specified, and that this negligence of the plaintiff caused damage to defendant, the damage should be deducted from the value of the plaintiff's services.

Id.—EVIDENCE—FAILURE OF ARCHITECT TO INSPECT WORK.—Where the evidence tended to show that the work had not been properly done, and that the plaintiff had certified to its conformity to the contract, the refusal to give such instruction was not justified merely because there was no direct evidence tending to show that the plaintiff had failed to inspect or test the work, or that he was negligent in his inspection or test. It was his duty to inspect and test it and to use due care and skill therein, and the jury might infer from the other facts in evidence either that he did not inspect it at all or that he was negligent in so doing.

Id.—REFUSAL OF INSTRUCTION NOT HARMLESS ERROR.—The refusal to give such instruction was not rendered harmless by the giving of an instruction that "the mere fact that some of the work was negligently done does not defeat the plaintiff's right to compensation. He is still entitled to compensation for the reasonable value of his services, and in determining such reasonable value of his services you may take into consideration the actual amount of damage (if any) which defendant has proved that he has suffered by reason of such negligence."

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing a new trial. George H. Buck, Judge, presiding.

The facts are stated in the opinion of the court.

Sullivan & Sullivan, and Theo. J. Roche, for Appellant.

De Laveaga & Magee, and Frank L. Owen, for Respondent.

SHAW, J.—Defendant appeals from an order denying his motion for a new trial.

The complaint is in two counts, each upon a distinct claim for money due, aggregating \$2,706.80. The first count alleges that, between February 1 and August 30, 1907, plaintiff performed services as architect for the defendant, at his request, in making plans and specifications and in superintending the erection of a building on Market Street in San Francisco, which services were reasonably worth \$1,506.80, for which sum defendant is indebted to him, and the same is wholly unpaid. The second count alleges that on February 2, 1907, defendant employed plaintiff as an architect to draw plans and specifications for a building to be erected by defendant on Larkin Street and to superintend the erection thereof, and agreed to pay plaintiff therefor a sum equal to five per centum on the cost of the building; that plaintiff began the performance of said services, and that while he was diligently engaged therein, the defendant, without cause or excuse, terminated his employment and refused to allow him to continue therein, although he was ready and willing to do so, whereby he was damaged in the sum of one thousand two hundred dollars, which remains wholly unpaid.

The answer to the first count denies that any service in superintending the building mentioned was performed except in the excavation of the basement and the erection of the concrete work, and it denies that the service was of any value. It further alleges that the plaintiff was negligent in the performance of said services, and that because of said neglect of the plaintiff the defendant, on August 30, 1907, discharged him. The answer to the second count denies the making of the agreement alleged, the performance of any services thereunder, the wrongful discharge, and the damages. By the way of set-off to both counts, it is alleged that plaintiff was employed by defendant to draw the plans and specifications for the said building on Market Street and to superintend the erection thereof, and that he undertook to use due care and skill therein, that the work was carelessly done by the contractor "in an unworkmanlike manner, and not in conformity with said specifications," that the plaintiff negligently "failed to properly inspect or test said work," and negligently issued certificates as architect

that said work was properly done, and that \$4,279.59 was due the contractor therefor, and thereby caused the defendant to accept said work and pay said sum, and that the said work was not worth more than one thousand five hundred dollars.

There was a jury trial and a verdict was returned for the plaintiff in the sum of one thousand five hundred dollars. The defendant claims that the court erred in certain rulings admitting evidence offered by the plaintiff and in refusing certain instructions requested by the defendant.

The Larkin Street building was not erected. The plaintiff's services in relation to it consisted only of the preparation of the plans and specifications. The main controversy was over the services upon the Market Street building. The plaintiff prepared the plans and specifications for the entire structure, let the contract for the basement excavation and for the concrete foundation walls and superintended the erection of said walls. He was discharged by the defendant when the foundation was completed.

It was not error to allow testimony as to the reasonable value of the services performed by the plaintiff upon the Market Street building. The complaint with respect to that building was in the form of a common count upon the *quantum meruit* for the value of the services performed. There was evidence that defendant had agreed to employ the plaintiff as architect thereon for the construction of the entire building and to pay him as compensation five per cent of the cost thereof, and that the premature discharge was without good cause. "It is the general rule that where an employee is, without cause, discharged by his employer during the term of his employment, he may regard the contract as rescinded and sue upon a *quantum meruit* and recover the reasonable value of his services, as if the special contract of employment had never been made." (*Brown v. Crown G. M. Co.*, 150 Cal. 384, [89 Pac. 86], and cases cited.) The evidence was therefore relevant to the issue, and there was no variance between this proof and the allegations.

The defendant asked an instruction to the effect that if the jury should find that the contractor for the foundation carelessly did the work in an unworkmanlike manner and not in conformity with the specifications, and that plaintiff carelessly failed to properly inspect or test the work and care-

lessly certified that the work was done properly and as specified, and that this negligence of the plaintiff caused damage to defendant, the damage should be deducted from the value of the plaintiff's services. This instruction was refused. There was no demurrer to the counterclaim on the ground of uncertainty, and evidence was given in support of it without objection. It appears to have been treated as sufficient in that respect. The record recites that evidence was given tending to show that the walls of the foundation were not, nor were any of them, constructed by the contractor in a workmanlike manner nor in accordance with the contract, that they were insufficient to sustain any four story building, that pieces of the concrete in them could easily be broken off and would easily crumble in one's hands, and that the value of the work so done by the contractor did not exceed fifteen hundred dollars. It also appeared that plaintiff had issued certificates stating that the work was completed according to the contract, and that the defendant had thereon paid the contractor the full contract price therefor.

The instruction should have been given. It contains a correct statement of the law, and it was applicable to the case as presented by the pleadings and the evidence above recited. It is true that in the recital referred to there is no express statement that there was any evidence tending to show that the plaintiff failed to inspect or test the work, or that he was negligent in his inspection or test. But it was his duty to inspect and test it and use due care and skill thereon. If no part of it was done in conformity with the contract, and he certified that it was all done in accordance therewith, the jury might reasonably infer either that he did not inspect it at all or that he was negligent in so doing.

The recital, of course, implies that the evidence tending to show the facts stated was substantial in character and sufficient to warrant the jury in finding that said facts existed. Consequently we cannot consider the error as a trivial one. The introduction of contradictory evidence would merely raise a question of fact to be submitted to the jury. It would not authorize the court to refuse the instruction.

The plaintiff claims that the refusal of this instruction was rendered harmless by an instruction given directing the jury that "the mere fact that some of the work was negligently

done does not defeat the plaintiff's right to compensation. He is still entitled to compensation for the reasonable value of his services, and in determining such reasonable value of his services you may take into consideration the actual amount of damages (if any) which defendant has proved that he has suffered by reason of such negligence." This instruction does not properly cover the point. The amount of damage caused by plaintiff's negligence is not directly relevant to the value of the services performed by him. It might have some bearing on the character of the service and in that way relate to the question of value. The jury may have understood the instruction to mean that they might consider the damage in this light, not for the purpose of deducting it from the value of the services proved, but to show that the services were poor in character, and that because of that fact they might reduce the estimate of the value of the plaintiff's services. This is not the same process as that of finding the true value of the services and the true amount of damage and deducting one from the other, which was the proposition contained in the instruction refused. The defendant was entitled to have it given as asked. '

The order is reversed.

Sloss, J., and Angellotti, J., concurred.

[Sac. No. 1875. In Bank.—November 15, 1912.]

**J. R. FRASER, Respondent, v. G. M. SHELDON, and
THE CARQUINEZ TRANSPORTATION COMPANY
(a Corporation), Appellants.**

APPEAL—ORDER DENYING NONSUIT.—An order denying a motion for a nonsuit is not an appealable order but may be reviewed on an appeal from the judgment.

Id.—APPEAL FROM JUDGMENT BY NEW METHOD—TIME FOR TAKING—FAILURE TO SERVE NOTICE OF ENTRY OF JUDGMENT.—An appeal from a judgment perfected under the provisions of section 941b of the Code of Civil Procedure is duly taken, when the notice of appeal was filed within six months after the date of entry of the judgment, but not within sixty days after said date, if no notice of the entry

of the judgment had been served on the appellants more than sixty days prior to the filing of the notice of appeal. If the record on appeal does not show that any notice of entry of judgment was served on the appellants, it must be assumed, in the absence of a showing to the contrary, that no such notice was served.

ID.—REVIEW OF EVIDENCE.—Upon an appeal so perfected any question may be reviewed, including the claim that the evidence does not sustain the findings, which could be reviewed upon an appeal taken pursuant to the provisions of section 939 of the Code of Civil Procedure, within sixty days of the rendition of the judgment.

ID.—BILL OF SALE GIVEN AS SECURITY—AGREEMENT TO RESELL—TITLE DOES NOT PASS.—A bill of sale of personal property executed for the purpose of securing an indebtedness due the apparent purchaser, with an agreement by the latter to resell the property to the apparent seller upon being paid the indebtedness, does not operate as a transfer of the title to the property.

ID.—ACTION FOR POSSESSION OF PERSONAL PROPERTY—FINDING NOT SUSTAINED BY EVIDENCE.—In an action to recover the possession of certain personal property, a finding that the plaintiff was the owner and entitled to the exclusive possession of the property involved, under a bill of sale and contracts with its prior owners, is held not to be supported by the evidence.

APPEAL from a judgment of the Superior Court of Solano County. A. J. Buckles, Judge.

The facts are stated in the opinion of the court.

H. W. Hutton, for Appellants.

George Clark, and T. T. C. Gregory, for Respondent.

THE COURT.—The complaint was filed on April 22, 1909, and the action is to recover possession of the value of certain personal property which plaintiff alleges in his complaint that he "is the owner of and entitled to the immediate and exclusive possession of,"—namely: "One twin screw boat called the Skimmer, formerly named the Fruitvale, including the pair of new Clifton engines upon said boat," and other described articles constituting her equipment; also two old barges and their equipment which, it is alleged, "lay on September 16, 1907, on the mud flat just below Benicia, California, at the old Delaney's Ways and Ship Yards"; also "one barge known as R. T. & C. Co. No. 1, including the

engine centrifugal pump used in or connected therewith," said scow being on September 16, 1907, "anchored at Benicia." It is also alleged that, at the time of filing the complaint, all said property was in the possession of defendants and wrongfully withheld from plaintiff, and that "the foregoing description is as accurate as plaintiff can give." A general demurrer to the complaint was overruled, as was also a demurrer that several causes of action had been improperly united.

Defendants answered by general denials of the averments of the complaint and also claiming ownership and right of possession in themselves then and at all times mentioned in the complaint. The cause was tried by the court and it made findings: 1. That the defendant company was a duly organized corporation; 2. That at the commencement of the action plaintiff "was and he ever since has been the owner of and entitled to the immediate and exclusive possession of all the personal property mentioned in the complaint"; 3. That at the commencement of the action all said property "was in the possession of defendants" without right and was being wrongfully detained; 4. That prior to the trial of the action the possession of all said property, except the barge described as R. T. & C. Co. and its equipment had been delivered to plaintiff by the sheriff, and plaintiff retained such possession "under proceedings duly and regularly had for that purpose in this cause"; 5. That the delivery of possession of the said barge last above particularly referred to and its equipment had not been made and was being withheld from plaintiff, and that the value of said property so withheld was five hundred dollars. As conclusion of law the court found that "plaintiff is entitled to judgment against defendants for the possession of the personal property described in the complaint and if delivery of the personal property mentioned in finding 5 cannot be had, then in addition plaintiff shall have judgment against defendants for the value thereof amounting to five hundred dollars in lieu of said property, and costs of suit." Judgment was entered accordingly.

Defendants appeal "from the judgment . . . entered . . . on the 25th day of February, 1910, and also from the order . . . denying defendants' motion for a nonsuit," on bill of exceptions.

The order denying defendants' motion for a nonsuit is not an appealable order. Such an order, however, can be reviewed on an appeal from the judgment.

While the notice of appeal from the judgment was not filed within sixty days from the date of entry of the judgment, it was filed within six months after said date, and the appeal was one perfected under the provisions of section 941b of the Code of Civil Procedure. It was duly taken within the time prescribed in said section, if no notice of the entry of said judgment had been served on appellants more than sixty days prior to such filing of the notice of appeal, the section providing substantially that such notice of appeal must be filed within sixty days after notice of entry of judgment has been served on the attorneys of record of the adverse party, and must, in any event, be filed not later than six months after such entry. If no notice of entry of judgment is so served, the party may file his notice of appeal at any time within six months from the date of such entry. The record here does not show that any notice of entry of judgment was served on appellants, and it must be assumed, in the absence of a showing to the contrary, that no such notice was served. (See *Foss v. Johnstone*, 158 Cal. 119, [110 Pac. 294].) Upon an appeal duly perfected pursuant to the provision of section 941b of the Code of Civil Procedure any question may be reviewed which could be reviewed upon an appeal taken, pursuant to the provisions of section 939 of the Code of Civil Procedure, within sixty days of the rendition of the judgment. (Code Civ. Proc., sec. 941c.) The claim that the evidence is not such as to sustain the findings of the trial court must, therefore, be considered.

Looking at the evidence in the light most favorable to plaintiff, as we must do in view of the findings of the court, the material facts appear to be as follows:

In the early part of the year 1907, two sisters, Mattie and Cherrie Bailey, were the owners of the personal property in question, and it was in charge of defendant Sheldon, their brother-in-law. It does not appear that any of the property was ever in the possession of plaintiff, and, as we understand the record, it was at all times prior to the organization of defendant corporation in the possession of Sheldon, as agent of the Bailey sisters. The boat originally named "Fruit-

vale" and now named "Skimmer" needed new engines and certain repairs, and plaintiff desired water transportation between Benicia, where he was engaged in business, and San Francisco. It was arranged between plaintiff and Sheldon, acting for the Baileys, that plaintiff should furnish the engine and other necessary things for the boat, and that a corporation to be known as the Rivers Transportation and Construction Company should be formed with a capital stock of seventy-five thousand shares, of which plaintiff should have twenty-five thousand shares for the money advanced, while the Baileys were to have the remaining fifty thousand shares. An instrument in the form of a bill of sale of the personal property was executed and delivered by the Baileys to plaintiff. It does not appear that plaintiff was ever given possession of any of the property. There is no conflict in the evidence on the proposition that the bill of sale was given and received solely as "security." Plaintiff furnished the engines and expended money for other purposes, including four hundred dollars for certain lands, the deeds to which were taken in his name, the aggregate amount of his bill being practically four thousand dollars. For some reason the original plan for the incorporation of a company was not carried out, but late in the year,—namely, on November 26, 1907, the attempted organization of defendant corporation was had. This was capitalized at fifty thousand dollars, and there were ten thousand shares. On September 16, 1907, a written agreement was entered into between plaintiff and Sheldon, whereby plaintiff agreed to convey to Sheldon the land purchased by him and all personal property here involved for four thousand dollars, ten dollars of which was paid at once, and \$3,990 was to be paid one year thereafter, with interest. This amount Sheldon agreed to pay at the time specified. It was provided therein:

"The said party of the second part (Sheldon) is to have immediate possession, use and control of all the above described property and is to care for the same and pay all state, town and county taxes or liens of whatsoever nature which may become due on the property above described.

"In the event of a failure to comply with the terms hereof by the said party of the second part, the said party of the first part may be released from all obligations in law or equity

to convey said property, and the said party of the second part shall forfeit all right thereto, and all money theretofore paid thereon shall be considered as rent for the use of said property and for liquidated damages for the nonfulfillment hereof by the said party of the second part. And the said party of the first part, on receiving such payment, at the time and in the manner above mentioned, agrees to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed and bill of sale conveying all of the above described property free and clear of all encumbrance made, done, or suffered by the said party of the first part."

The agreement was signed by plaintiff and Sheldon. There is absolutely no evidence to the effect that the Baileys ever had any knowledge of the provisions of this agreement, and there was nothing to indicate any authorization on their part to Sheldon to enter into any such agreement. When the agreement was signed, plaintiff receipted as paid his bill against Miss Cherrie Bailey for the money due him, and gave it so receipted to Sheldon. In the early part of March, 1908, as we understand the record, he returned to Sheldon the bill of sale he had received from the Baileys, apparently surrendering all claim thereunder. Defendant Carquinez Transportation Company was in possession of the personal property at all times after its attempted incorporation November 26, 1907, operating the steamer from at least March, 1908, Sheldon being the general manager of said company. In the early part of 1908 it was orally agreed between plaintiff and those interested in defendant corporation that plaintiff would take one-third of the residue of the stock thereof after deducting six hundred shares sold to one Needham for one thousand dollars (one-third of which amount was paid to and accepted by plaintiff) in full satisfaction of his claim. According to the plaintiff's testimony he "agreed that after that six hundred shares that was issued to Needham, that was to be deducted, and I was to have one-third of the balance." Stock was subsequently tendered him, but the claim was made that he was not being given the amount he was entitled to, and he refused to accept it, and declared the agreement at an end. The certificate for such stock is still being held for him. No part of the amount due under the agree-

ment of sale was ever paid in money, and this action was brought after the expiration of the time prescribed therein for such payment. The boat was enrolled at the custom house in San Francisco on March 16, 1908, plaintiff then certifying that he had built it in 1908 for the Carquinez Transportation Company. Plaintiff testified that it was to be enrolled in his name, but could not be as he was not a citizen of the United States.

The difference between the parties as to the stock was due to the fact that one thousand shares of the ten thousand were never issued, but were proposed to be retained as treasury stock. This left the total issue nine thousand shares, of which Needham was given six hundred for one thousand dollars cash, in which plaintiff participated by receiving his one-third. This left eight thousand four hundred shares to be divided among plaintiff and the two Baileys, each being entitled to two thousand eight hundred shares. This was the amount the tendered certificate represented. The plaintiff claimed that under his agreement he was entitled to one-third of *all* the capital stock provided for in the articles of incorporation, after deducting Needham's six hundred shares; in other words, that he should also have one-third of the one thousand shares treasury stock, which, of course, would entitle the two Baileys to the remaining two-thirds thereof, for it is clear that all the arrangements contemplated that plaintiff and each Bailey should be equal owners, each owning one-third.

It is respondent's theory that the bill of sale from the Baileys to him was absolute and not a mortgage; that although he had some negotiations with Sheldon and the Carquinez Transportation Company with a view to the acceptance of the stock for his interest in the property, and had even surrendered his bill of sale in contemplation of the completion of the transaction, nevertheless he had never become bound to take such stock; and that the contract between him and Sheldon had been accepted and recognized by the corporation which, through its president Frame, and its manager Sheldon, had urged him to procure the enrollment of the "Skimmer" as his own, but finding that impossible because he was an alien, had induced him to swear that he had built the vessel for the company. Respondent also insists that,

even assuming the bill of sale to be a mortgage, and assuming the transfer of their title by the Baileys to the corporation after the execution of that instrument, the superior court was justified in inferring that the corporation accepted the benefits of the promoter's contract and consented to what is termed "a common method of private foreclosure—a sale by the mortgagee with the mortgagor's consent." And finally respondent submits that his refusal to take security which was a mortgage in form, together with the absence of any evidence that the Baileys intended the bill of sale as a mortgage, justified the conclusion that title to the property had unqualifiedly passed to him to be properly asserted by him after the breach of the contract of sale to Sheldon. The first contention is without merit, because the respondent testified that he took the bill of sale as security. We quote some of the questions and his answers thereto as indicating how unqualified was his statement upon this point:

"Q. Isn't it a fact that this paper which you say was written was given to you simply as a guarantee for this \$4,000? Is that right? It was given to you as security for this money which you paid for the machinery, and as security that it be carried out? A. Yes, sir.

"The Court: Q. It was given to you as security, that is what he asked you; do you understand it? A. Yes, sir. It was given to me as security.

"Q. For what? A. For what money that I advanced.

"Q. The four thousand dollars? A. Yes, sir."

Further answering a question propounded by his own counsel he said: "Mr. Sheldon offered to give me a mortgage also as security. He offered to give me a mortgage and I would not accept a mortgage; and then he gave me that bill of sale of the property, and then issued an agreement whereby I was to sell it back to him, when he paid me the full amount." Clearly such a contract, even though the plaintiff refused to take an agreement which was a mortgage in form, could not operate as a transfer of title to the property. (Civ. Code, secs. 2888 and 2889.)

Plaintiff's position that he was not bound to accept stock cannot be maintained, because the agreement by which he was to take such stock in lieu of his claim against the boats was partially executed by his acceptance of some of the money

received from Needham. At the very least he should have returned this money to the corporation before seeking to foreclose his lien, if he still had one. The same reasoning applies to respondent's other contentions. Even if the conduct of Sheldon and Frame amounted to a recognition by the corporation of the contract between Sheldon and himself, the subsequent acts of plaintiff in surrendering the bill of sale, the evidence of his lien, and in accepting the money received from the sale of stock, showed that he had abandoned all idea of enforcing that contract. So, too, any right of "private foreclosure" was cut off by the partially consummated exchange of all of plaintiff's interest for stock. And, finally, although there is no evidence that the Baileys executed the bill of sale as a mortgage, there is the plaintiff's own statement that he took it as security for the money he had advanced. This emphatically negatives his claim of unqualified title. We conclude, therefore, that the evidence was not sufficient to support the finding that the plaintiff was the owner and entitled to the exclusive immediate possession of the property involved.

This conclusion makes it unnecessary to indulge in more than a brief reference to other alleged errors. One of these related to the admission of parol evidence of the contents of the bill of sale, which was not in the custody of either of the defendants, but was, according to the affirmation of their counsel, in the possession of the Misses Bailey. Of course we need not review this matter at length, because in case of the necessity of procuring the document in the trial of this or any other action a new demand will become necessary and counsel will naturally take all proper means of producing the exhibit. Testimony given by plaintiff with reference to the value of one of the barges was also attacked as insufficient to justify the finding that it was worth five hundred dollars. In any view of the matter this testimony was far from satisfactory, and if it becomes necessary again to establish the value of the missing barge, doubtless testimony more ample will be adduced.

No other alleged errors require comment.

The judgment is reversed.

Rehearing denied.

Beatty, C. J., does not participate in the foregoing decision.

[S. F. No. 5553. Department One.—November 16, 1912.]

THE PEOPLE, Respondent, v. **THE METROPOLITAN SURETY COMPANY** (a Corporation), and **ALFRED C. SKAIFE**, as Receiver in the State of California of the Metropolitan Surety Company (a Corporation), Appellants.

JURY TRIAL—RULE OF COURT—WAIVER BY FAILURE TO DEMAND AT CALLING OF TRIAL CALENDAR.—Notwithstanding a rule of the superior court to the contrary, a party to an action in which a jury trial is a constitutional right, does not waive such right by failing to demand a jury at the calling of the trial calendar, when the cause was answered "ready" and set for a subsequent day for trial.

ID.—CONSTITUTIONAL RIGHT TO JURY TRIAL—LEGISLATURE ONLY CAN PRESCRIBE WHAT CONSTITUTES WAIVER.—The legislature, by virtue of the provision of section 7 of article I of the constitution, that a jury trial may be waived in civil cases "by the consent of the parties, signified in such manner as may be prescribed by law," is given the sole power of declaring what shall constitute a waiver of trial by jury, and has exercised its power by the enactment of section 631 of the Code of Civil Procedure. A jury may be waived only in one of the three modes prescribed by that section.

ID.—RULE REQUIRING DEPOSIT OF JURY FEES.—The cases holding that, notwithstanding the provisions of section 631 of that code, the court may make reasonable rules regulating the right of a party to claim a jury trial, and that such trial may be properly refused when there has been a failure to comply with such rules, go no further than to uphold a rule requiring the deposit of jury fees as a condition to the insistence upon the right.

ID.—JURY NOT WAIVED BY IMPLICATION—CONSTRUCTION OF RULE.—The right to a jury trial should not be held waived by implication; and, if the validity be admitted of a rule of court that "upon the calling of the trial calendar, in all cases answered 'ready,' the parties shall announce whether a jury is required, and shall at such time demand a jury, if desired, and if no jury is demanded at such calling it shall be deemed to be waived and a waiver of a jury will thereupon be entered on the minutes by the clerk," no waiver thereunder takes place, unless the cause was answered "ready" at the calling of the trial calendar, and an entry of the waiver was made in the minutes.

PUBLIC OFFICER—SURETY ON OFFICIAL BOND—OFFICER SUCCESSOR TO HIMSELF—LIABILITY FOR PRIOR DEFAULTS.—The surety upon the

official bond of a public officer cannot, in the absence of express stipulation to that effect, be held liable for defaults or delinquencies of the principal occurring before the execution of the bond. This rule is not altered by the fact that the principal had been the incumbent of the office for a preceding term.

ID.—PRESUMPTION AS TO TIME OF DEFALCATION.—In a suit against a surety to recover the amount of a shortage in the accounts of a public officer who has filled several successive terms, the mere fact of a defalcation, without more, creates no presumption as to the time when it occurred. The time of its occurrence is for the jury to determine from all the facts in evidence, and the burden of proof on that issue is on the plaintiff.

APPEAL from a judgment of the Superior Court of Contra Costa County and from an order refusing a new trial. W. S. Wells, Judge presiding.

The facts are stated in the opinion of the court.

Edward C. Harrison, for Appellants.

H. V. Alvarado, District Attorney, for Respondent.

SLOSS, J.—The defendants appeal from a judgment in favor of plaintiff and against the corporation defendant for \$18,732.85, and from an order denying their motion for a new trial.

The above-mentioned sum was the amount of an alleged shortage in the accounts of George A. Wiley, as treasurer of Contra Costa County, and the action was brought to recover this sum from the corporation defendant, as surety on Wiley's official bond.

Wiley was elected county treasurer in November, 1902, to serve for a term beginning January 5, 1903, and ending on January 7, 1907. He duly qualified, giving a bond in the penal sum of eighty thousand dollars, executed by United States Fidelity and Guaranty Company as surety. In November, 1906, he was elected for a second term, and in the same month he executed a bond, with the defendant, The Metropolitan Surety Company, as surety, in the penal sum of one hundred thousand dollars, to secure the faithful performance of his duties during the succeeding term. He continued to occupy the office of treasurer of the county until

the fourth day of February, 1907, when he committed suicide. A count of the money remaining in the treasurer's vault disclosed a shortage as above stated, and this action followed.

When the cause came on for trial, the defendant demanded that a jury be impaneled and that the trial be had before a jury. The action was unquestionably one in which either party was entitled to a jury trial, unless the right had been waived. The court, however, declined to comply with the demand, and proceeded to try the cause without a jury, taking the position that the following circumstances, disclosed by the record, constituted a waiver by defendant of its privilege of a jury trial.

A rule of the superior court of Contra Costa County, in force at the time of the proceeding under review, read as follows: "Upon the calling of the trial calendar, in all cases answered 'ready' the parties shall announce whether a jury is required, and shall at such time demand a jury, if desired, and if no jury is demanded at such calling it shall be deemed to be waived and a waiver of a jury will thereupon be entered on the minutes by the clerk." The case had originally appeared on the trial calendar of the said court on June 8, 1912, to be set for trial. On that day the cause was set for trial for July 16, 1908, the clerk's minute entry showing that the setting had been so ordered on motion of plaintiff's attorney.

On July 16, 1908, the cause was regularly called for trial, counsel for both parties being present. Counsel for defendants urged a continuance for two weeks, filing an affidavit in support of his motion. The motion was granted, and the cause was peremptorily set for trial on the thirtieth day of July, 1908. The clerk made an entry in the minutes, stating merely that the cause came regularly before the court, counsel for the respective parties appearing, that defendant by its counsel filed an affidavit and made a motion for a continuance, and that the court ordered that "this cause be and the same is hereby continued to and peremptorily set for Thursday, July 30th, 1908, at 10 o'clock A. M." No jury was in attendance upon the court on July 30th, and no demand for a trial by jury had theretofore been made.

We think the court erred in holding that the facts above recited constituted a waiver of defendant's right to a jury

trial. The constitution (art. I, sec. 7), after declaring the inviolability of the right of trial by jury, provides that such trial may be waived in civil cases "by the consent of the parties, signified in such manner as may be prescribed by law." The legislature is thus given the sole power of declaring what shall constitute a waiver of trial by jury (*Exline v. Smith*, 5 Cal. 112), and has exercised its power by the enactment of section 631 of the Code of Civil Procedure. That section provides that trial by jury may be waived . . . "in actions arising on contract, . . . in manner following:

"1. By failing to appear at the trial.

"2. By written consent, in person or by attorney, filed with the clerk.

"3. By oral consent, in open court, entered in the minutes."

This court has repeatedly held that a jury may be waived only in one of the three modes prescribed by this section. (*Swasey v. Adair*, 88 Cal. 179, [25 Pac. 1119]; *Farwell v. Murray*, 104 Cal. 464, [38 Pac. 199]; *Platt v. Havens*, 119 Cal. 244, [51 Pac. 342].) The record here shows no waiver by any of these modes.

The respondent relies, however, upon the rule of court, providing that a failure to demand a jury when the cause is answered "ready," upon the calling of the trial calendar, shall be deemed a waiver. It has been held, notwithstanding the provisions of section 631, that the court may make reasonable rules regulating the right of a party to claim a jury trial, and that such trial may properly be refused when there has been a failure to comply with such rules. But the cases so holding go no further than to uphold a rule requiring the deposit of jury fees as a condition to the insistence upon the right. (*Adams v. Crawford*, 116 Cal. 495, [48 Pac. 488]; *Naphtaly v. Rovegno*, 130 Cal. 639, [63 Pac. 66, 621].) And this conclusion may be readily supported in view of the fact that, in the absence of such deposit, the payment of the fees which must be incurred by reason of the demand could not be adequately secured. The ruling has been otherwise, however, with regard to a rule like the one here involved. In *Biggs v. Lloyd*, 70 Cal. 447, [11 Pac. 831], a judgment was reversed on account of the refusal of a jury trial, notwithstanding the failure of the appellant to comply with a rule

of court requiring that "if a jury is desired, it shall be demanded on the law day when the case is set for trial." It follows that the rule involved in this case did not authorize the refusal of a jury trial.

But, even if the rule be regarded as valid and effective, the respondent's position is open to the further objection that the facts necessary to constitute a waiver under the terms of the rule were not shown. The requirement is that a jury be demanded upon the calling of the trial calendar in all cases answered "ready." It does not appear that the case at bar was answered "ready" by either party. All that is stated in the bill of exceptions is that both parties were present by counsel, and that the defendant moved for a continuance, which was granted. The record is entirely consistent with the view that the plaintiff's counsel was not ready to go to trial. The right to a jury trial should not be held waived by implication. (*Platt v. Havens*, 119 Cal. 244, [51 Pac. 342].)

Furthermore, there was no entry in the minutes of a waiver of jury trial, as required by the rule. This might not be very important, if a similar requirement were not also contained in subdivision 3 of section 631. But that subdivision makes such entry necessary in the case of an oral waiver. The purpose doubtless was to furnish record evidence of a consent which would otherwise rest merely on parol proof, and the rule was apparently framed with the intent of following the code section. The entry was, therefore, a necessary part of a waiver under the rule, as under the code, and the mere failure to demand a jury, not entered in the minutes, did not constitute the waiver contemplated.

These views will necessitate the reversal of the judgment. As an aid to the conduct of another trial, some of the other questions presented may be briefly noticed.

The appellant had, by the provisions of the bond which it executed, made itself liable only for any default of which Wiley might be guilty during his second term, beginning in January, 1907. It could not, in the absence of express stipulation to that effect, be held for defaults or delinquencies of the principal occurring before the execution of the bond sued upon. (Mechem on Public Officers, sec. 285.) This rule is not altered by the fact that the principal has been the incum-

bent of the office for a preceding term. (*United States v. Boyd*, 15 Pet. 187, [10 L. Ed. 706]; *Bissell v. Saxton*, 66 N. Y. 60; *Detroit v. Weber*, 29 Mich. 24; *McPhillips v. McGrath*, 117 Ala. 549, [23 South. 721].) The plaintiff, recognizing the force of this consideration, alleged in its complaint the misappropriation and conversion by Wiley of the sum sued for "during his last term of office." This allegation the defendant denied, and the plaintiff was, accordingly, bound to prove it in order to be entitled to a judgment. The finding of the court was in favor of the plaintiff on this issue. We shall not stop to detail the evidence, or to consider at any length the appellant's contention that the finding in question is not supported. Since there must be a new trial for reasons already indicated, it will suffice to say that we think the proof offered was such as to have justified a jury (or the court, in the absence of a jury) in finding either way on the question whether the defalcation had occurred during the first or the second term. The case was one in which the time of the defalcation was to be determined by inference from the various facts and circumstances shown.

The respondent contends that, in a suit to recover the amount of a shortage discovered in the accounts of an officer who has filled several successive terms, the presumption is that the misappropriation took place during the last term. There are authorities declaring this to be the rule, the theory underlying it being that the presumption of the performance of official duty authorizes the conclusion that the officer, at the end of one term, has duly accounted to himself as his own successor. (*Bruce v. United States*, 17 How. (U. S.) 437, [15 L. Ed. 129]; *United States v. Earhart*, 4 Saw. 245, [Fed. Cas. No. 15,018]; *Kelly v. State*, 25 Ohio St. 567.) A similar declaration was made by this court in *Heppe v. Johnson*, 73 Cal. 265, [14 Pac. 833], but the ruling was not, apparently, necessary to the decision.

On the other hand, various well-considered cases deny the existence of any such presumption, or confine its applicability to cases where there is no evidence at all tending to show that the misappropriation was during the earlier term. (*Williams v. Harrison*, 19 Ala. 277; *McPhillips v. McGrath*, 117 Ala. 549, [23 South. 721]; *Trustees of School v. Smith*, 88 Ill. 181; *Myers v. United States*, 1 McLean, 493, [Fed. Cas. No. 9996];

Williams v. State, 89 Ind. 570; *Freeholders v. Wilson*, 16 N. J. L. 110.) We think the sound view is that from the mere fact of a defalcation, without more, no presumption as to the time when it occurred arises. The presumption that an officer has performed his official duty is, at best, "weak and inconclusive" (*Williams v. Harrison*, 19 Ala. 277), and whatever force it possesses would seem to vanish upon proof that the particular duty in question (i. e., that of safe-keeping and accounting for the public funds) had in fact been violated. In *Anaheim U. W. Co. v. Parker*, 101 Cal. 483, 487, [35 Pac. 1048, 1049], this language was used: "Where a second bond is executed, the sureties are not liable for money converted by the officer prior to its execution, and the plaintiffs are bound to show a conversion after the execution of the bond sued upon." The decision, in effect, overrules the dictum in *Heppe v. Johnson*, above referred to.

The case should, therefore, be submitted to the jury without any instruction that there is a presumption that a defalcation (if one be shown) occurred at one time rather than another. The jury is to be permitted to find, from all the facts in evidence, whether such defalcation occurred, in whole or in part, during Wiley's second term, the burden of proof, on this issue, being on the plaintiff.

There was no error in permitting the plaintiff to prove the receipt by Wiley as treasurer of sums not shown in the auditor's books, such as moneys belonging to the estates of deceased persons. The allegations of the complaint, fairly construed, are sufficiently broad to cover these items.

The foregoing, we think, covers all the material matters that are likely to arise upon another trial.

The judgment and the order appealed from are reversed.

Shaw, J., and Angellotti, J., concurred.

[S. F. No. 6108. Department One.—November 18, 1912.]

In the Matter of the Estate of CATARINA SEILER, Deceased. PHILLIPP SEILER, Appellant; GEORGE R. ANDREWS, Respondent.

DIVORCE—INTERLOCUTORY DECREE DOES NOT DISSOLVE MARRIAGE—FINAL JUDGMENT.—The entry of an interlocutory decree of divorce does not dissolve the marriage, and the parties thereto remain in the legal relation of husband and wife until the marriage has been dissolved by the final judgment.

ID.—DEATH OF WIFE AFTER INTERLOCUTORY DECREE—SURVIVING HUSBAND ENTITLED TO LETTERS OF ADMINISTRATION.—A surviving husband, against whom an interlocutory decree of divorce has been entered, has a priority of right to letters of administration on the estate of his deceased wife.

ID.—ENTRY OF FINAL DECREE AFTER DEATH OF WIFE—HUSBAND'S RIGHTS OF INHERITANCE NOT DESTROYED.—The entry of a final decree in the divorce action, after the death of the wife, as provided in section 132 of the Civil Code, did not operate retroactively to take away rights of inheritance which had, by such death, become vested in the surviving husband.

APPEAL from an order of the Superior Court of Fresno County granting letters of administration on the estate of a deceased person. George E. Church, Judge.

The facts are stated in the opinion of the court.

Frank Hauke, for Appellant.

M. F. McCormick, for Respondent.

SLYSS, J.—Catarina Seiler died intestate on the third day of October, 1911. She was a resident of the county of Fresno, and left estate therein. Petitions for letters of administration were filed by Phillipp Seiler, claiming to be the surviving husband of the decedent, and by the public administrator. The court made its order denying the application of Seiler and granting that of the public administrator. Seiler appeals from the order.

The appellant was concededly entitled to administer if he was the surviving husband of the decedent. That he had

been her husband was not disputed. The public administrator was permitted, over Seiler's objection, to prove that in April, 1911, some six months before Mrs. Seiler's death, and about seven months before the hearing on the applications for letters, an interlocutory decree in favor of plaintiff had been given and entered in a divorce action instituted by Catarina Seiler against Phillipp Seiler. The trial court apparently took the view that the entry of this decree terminated the relation of husband and wife between the parties to the action, and deprived the former husband of the right of inheritance from his wife. This was error. Any doubt that may have existed on this point at the time of the hearing has been resolved by the decision of this court in *Estate of Dargie*, 162 Cal. 51, [121 Pac. 320], filed in January of the present year. It was there held, in a case presenting a similar question to the one now before us, that the entry of the interlocutory decree does not dissolve the marriage. "By the terms of the statute," says the opinion, "it is the final judgment alone that grants the divorce, dissolves the marriage, restores the parties to the *status* of single persons, and permits each to marry again." Until the court has by final judgment, declared the marriage dissolved, "the parties remain in the legal relation of husband and wife." At the time of the hearing for letters of administration in this case, no final decree of divorce had been rendered. In fact, none could have been rendered, the interlocutory decree being then less than one year old. It follows that, under the rule declared in the *Dargie* case, the appellant was the surviving husband of the decedent, and as such entitled to letters.

It is suggested by respondent in his brief that, pending the present appeal, a final decree of divorce has been entered. While this does not appear in the record, the appellant concedes the fact, and states his willingness to have it considered here. Section 132 of the Civil Code contains a provision to the effect that the death of either party to a divorce action after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment. The purpose of this provision is not entirely clear. Possibly it was designed to enable the court to establish, by final decree rendered after the death of a party, property rights which had been passed upon, provisionally or otherwise (*Pereira v.*

Pereira, 156 Cal. 1, [134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880, 103 Pac. 488]) in the interlocutory decree. But certainly such final decree could not have been intended to effect the dissolution of the marriage. This result is already accomplished by the death of one of the parties. Nor can we believe that the legislature intended to authorize the court, possibly of its own motion and against the will of the only remaining party in interest (Civ. Code, sec. 132), to enter a decree which should operate retroactively to take away rights of inheritance which had, by the death, become vested in the surviving spouse. So that, if we may act upon the appellant's concession to the extent of considering a fact occurring since the taking of the appeal, and not shown by the record, it must still be held that the husband's right of succession with respect to his wife's estate was not affected by the divorce proceedings.

The order is reversed.

Shaw, J., and Angellotti, J., concurred.

[L. A. No. 2993. Department One.—November 18, 1912.]

K. LUNDEEN, Respondent, v. GEORGE M. OTTIS,
Appellant.

EXCHANGE OF LANDS—COMMISSION TO BROKER—ACCEPTANCE OF OFFER TO EXCHANGE—IMPEACHMENT OF CONTRACT.—A written contract obligating the promisor to pay a commission to a broker, upon the latter's securing an acceptance of an offer made by the promisor to a third party for the exchange of land, is valid, and can be impeached or set aside by the promisor only by showing that its execution was obtained by duress, menace, fraud, undue influence, or mistake, or that it was without consideration.

ID.—CONSIDERATION—COMMISSION WHEN EARNED.—Such contract is founded upon a sufficient consideration, and entitles the broker to the commission upon obtaining an agreement from such third person that would bind him to make the exchange. After such an agreement had been obtained, the broker's right to the commission cannot be defeated by the abandonment by his principal of his own right to enforce performance of the agreement for exchange.

ID.—REFORMATION OF CONTRACT—INSUFFICIENT ALLEGATIONS OF FRAUD AND MISTAKE.—In an action by the broker to recover the stipulated commission, an answer which seeks a reformation of the contract, so as to make the commission payable only upon the consummation of the exchange, but which merely alleges that prior to the execution of the contract the defendant had agreed to pay a commission if the exchange were consummated, and that the plaintiff, at the time of its execution, had stated that he would expect to be paid a commission only in that event, is insufficient to show either fraud or mistake in the execution of the contract, and does not warrant its reformation on either of such grounds.

ID.—REFUSAL OF AMENDMENT TO ANSWER—TRUTHFUL REPRESENTATIONS BY AGENT.—The refusal of the court to allow such answer to be amended, by alleging that at the time of the execution of the contract the parties stood in confidential relations to each other, and that the plaintiff had represented the contract to be an agreement for an exchange of property, was not erroneous, if the contract as executed was in legal effect such an agreement. Such representation being true, and nothing being alleged to show that it was misleading, did not constitute fraud, even if the parties did stand in confidential relations.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial.
J. P. Wood, Judge.

The facts are stated in the opinion of the court.

Avery & French, for Appellant.

E. B. Drake, for Respondent.

SHAW, J.—The defendant appeals from the judgment and from an order denying a new trial.

The action is upon a written contract whereby Ottis agreed to pay Lundeen \$2,933, as commission for his services in procuring one W. H. Graham to accept a written offer to Ottis to exchange certain parcels of land belonging to Ottis for certain other parcels belonging to Graham. The offer of Ottis described the respective lands, stated the terms of the proposed exchange, authorized Lundeen to negotiate the exchange as agent of Ottis, and concluded with the following provision: "And it is further agreed with said Lundeen that when he has secured an acceptance of the within proposition

I will then pay the sum of two thousand nine hundred and thirty-three and no 100 dollars as commission for said services." It was signed by both Ottis and Lundeen. On the following day Lundeen induced Graham to accept the offer and to sign a written statement, indorsed on said offer, accepting the proposal and agreeing to furnish an abstract of title within thirty days and thereupon to make and deliver a deed conveying to Ottis the title to his property.

The answer admitted the execution of the contract with Lundeen, contained in the written offer, and the acceptance of the offer by Graham. It further alleged that the offer was prepared by Lundeen, partly in print and partly in typewriting, that the "major portion" of the agreement to pay the commission was in print, that prior to signing the same Ottis had agreed to pay Lundeen a commission if the exchange were consummated; that at the time of signing the said document Lundeen handed to Ottis the written offer so prepared and stated to Ottis that he, Lundeen, would expect him, Ottis, to pay a commission only in the event that the exchange was consummated, and that, relying on this statement, Ottis signed the written offer containing said agreement for commissions. It was also alleged that Ottis, in pursuance of the accepted offer, put deeds conveying his property to Graham in escrow, to be delivered on performance by Graham of his part in the exchange, that Ottis was at all times ready and able to carry out his proposal, but that Graham neglected to perform and that, after waiting five months, Ottis demanded performance, which Graham refused, whereupon Ottis withdrew his deeds from escrow and the exchange was never made. The prayer of the answer was that the agreement with Lundeen for commissions be reformed by striking out the words "when he has secured an acceptance of the within proposition" and inserting instead thereof the words, "upon the consummation of said exchange," and that plaintiff take nothing by his action.

These facts constitute no defense to the action. The clause quoted from the writing constituted a valid contract binding Ottis to pay Lundeen the commissions sued for upon the acceptance of the offer by Graham. Its execution by Lundeen and Ottis is admitted. It could be impeached or set aside only by showing that its execution was obtained by duress,

menace, fraud, undue influence, or mistake (Civ. Code, sec. 1567), or that it was without consideration. The allegations do not suggest menace, duress, or undue influence. They are not sufficient to show fraud or mistake. It is not alleged that Ottis did not read the contract before he signed it, or that he was then ignorant of its contents. There is an allegation that when Lundeen handed Ottis the written offer, before signing, he, Ottis, "thought it was an agreement for an exchange of properties." The contract when signed by Graham, as was contemplated, would be, in fact, an agreement for such exchange. This statement, therefore, shows no misunderstanding, as to the agreement. Hence, there was no mistake. It is not stated that any artifice was practiced to induce him to refrain from reading it or that he was unable to read, or that the contents of this clause were in any way misrepresented. The statement by Lundeen that he would expect the commission only in the event that the exchange was completed, was not a representation that the agreement so provided, nor a representation of any kind in regard to the contents of the instrument. It was, at most, a voluntary promise by Lundeen that he would, to that extent, disregard or waive the agreement. Being without consideration, it was not binding, and being a part of the contemporary oral negotiations, it cannot be allowed to vary the terms of the writing. (Civ. Code, sec. 1625, Code Civ. Proc., sec. 1856.) It is not alleged that it was made without any intent to perform it, and, therefore, it is no basis for a charge of fraud. There are no facts alleged sufficient to constitute such charge. What has been said sufficiently disposes of the claim that the contract should be reformed in the particulars prayed for.

There was no want of consideration. According to the terms of the offer, all that Lundeen was to do to earn the commission was to act as the agent of Ottis in "negotiating an exchange" of the properties. The answer states on this point that Ottis desired to obtain an agreement that would bind Graham to make the exchange. It does not appear that he desired anything more or that further action was necessary. Lundeen accomplished this task. The offer and the acceptance of Graham constitute a valid contract between Ottis and Graham binding on both. No further negotiations remained to be made. The only thing remaining undone was

performance, which Ottis could have enforced by suit against Graham. Lundeen did not undertake to compel such performance. He was entitled to the commission, even according to defendant's own statement, when he procured Graham to execute the acceptance. Ottis could not defeat Lundeen's right to commission by abandoning, as it seems he has, his own right to enforce performance by Graham.

On the trial, when Ottis offered to introduce evidence in support of his answer, the court ruled that the facts alleged constituted no defense to the action, excluded all the evidence offered and directed the jury to render a verdict for the plaintiff, which was accordingly done. For the reasons above stated we conclude that there was no error in this.

Defendant at that time asked leave to amend his answer by adding thereto an allegation that at the time he signed the written proposal, Lundeen, who had prepared it, represented it to be an agreement for an exchange of property and the further allegation that Lundeen was then "the trusted agent of defendant and stood in relation of special trust and confidence to defendant and was relied upon by defendant as such confidential agent." Leave to do so was refused. The amendment would not have made the answer good. The executed offer did constitute an agreement for exchange. The representation as alleged was therefore not false, but true, and nothing is alleged to show that it was misleading. It is not alleged that Lundeen stated that the offer contained nothing else except an agreement to exchange properties or represented that it did not contain the agreement to pay commissions. Consequently, whether at the time the alleged statement was made Lundeen was a trusted agent or was acting at arms' length, the representation was true and did not constitute fraud.

The judgment and order are affirmed.

Angellotti, J., and Sloss, J., concurred.

[L. A. No. 3010. Department One.—November 18, 1912.]

A. M. RUIZ, as Special Administrator of the Estate of Frederick Joseph Litterst, Deceased, Appellant, v. SANTA BARBARA GAS AND ELECTRIC COMPANY (a Corporation), Respondent.

NEGLIGENCE—ACTION BY ADMINISTRATOR TO RECOVER FOR DEATH—PLEADING—ALLEGATION SHOWING HEIRS OF DECEASED ESSENTIAL. The complaint in an action brought, under section 377 of the Code of Civil Procedure, by the administrator of the estate of a deceased person who was not a minor, to recover damages for his negligent death, fails to state a cause of action unless it be alleged that the deceased left heirs. A mere allegation that by reason of the death, "his heirs and personal representatives have suffered damages" in a specified sum is insufficient.

ID.—ACTION BY SPECIAL ADMINISTRATOR—SUBSTITUTION OF GENERAL ADMINISTRATOR.—Under section 1416 of the Code of Civil Procedure, the general administrator of the estate of a deceased person is entitled to be substituted as plaintiff in, and to prosecute to final judgment, any action instituted by a special administrator of the estate which he was authorized to commence.

✓ **ID.—ACTION BY PERSONAL REPRESENTATIVE OF DECEASED—RECOVERY FOR BENEFIT OF HEIRS OR RELATIVES—NEGLIGENT DEATH OF EMPLOYEE.**—The action authorized by section 377 of the Code of Civil Procedure to recover damages for the negligent death of a person not a minor, is solely for the benefit of the heirs of the deceased. The money recovered in such action does not belong to the estate but to the heirs only, and the administrator has the right to bring the action only because the statute authorizes him to do so, but he is simply made a statutory trustee to recover damages for the benefit of the heirs. The same is true of the action authorized by section 1970 of the Civil Code, as amended in 1907, purporting to give a right of action, for and on behalf of "the widow, children, dependent parents, and dependent brothers and sisters," against an employer for damages resulting from the death of an employee in certain cases, to "the personal representatives of such employee." ||

ID.—SPECIAL ADMINISTRATOR MAY SUE FOR NEGLIGENT DEATH—ORDER OF APPOINTMENT AUTHORIZING SUIT.—Section 1415 of the Code of Civil Procedure authorizes the commencement and maintenance by a special administrator, when authorized by the order of court appointing him, of any suit or legal proceeding that might be commenced or maintained by the general administrator or exec-

utor; and, as the right to maintain an action to recover for a negligent death under either section 377 of the Code of Civil Procedure or section 1970 of the Civil Code is expressly conferred upon such general personal representatives, the special administrator has the same right, when authorized by the order of court appointing him.

ID.—AMENDED COMPLAINT—NEW CAUSE OF ACTION NOT STATED—STATUTE OF LIMITATIONS.—Where there is no attempt to state a new cause of action in an amended complaint, but merely the addition of matters essential to make the original cause of action complete, the amendment, though made after the expiration of the period of limitation for the action, relates back to the time of its commencement.

ID.—FAILURE TO ALLEGE HEIRSHIP OR RELATIONSHIP TO DECEASED—AMENDED COMPLAINT CURING DEFECT—ERROR IN REFUSING LEAVE TO FILE.—Where the original complaint in an action instituted by a special administrator to recover for the alleged negligent death of an employee of the defendant, was filed in time but was defective in failing to show that the deceased left any heirs, as required by section 377 of the Code of Civil Procedure, or any relatives for whose benefit such action is authorized by section 1970 of the Civil Code, an amended complaint curing the defect does not state a new or different cause of action, and it was error for the trial court to refuse to permit it to be filed on the ground that a new cause of action was stated therein, which was then barred by the statute of limitations.

ID.—APPLICATION FOR LEAVE TO FILE AMENDED PLEADING—PROPER PRACTICE—SUFFICIENCY SHOULD BE TESTED BY DEMURRER.—On an application to the trial court for leave to file such an amended complaint, the court should not consider any objection based upon the sufficiency of its allegations as a matter of pleading, or any objection based upon the statute of limitations. The proper practice is to permit the amendment to be filed and to determine its sufficiency on demurrer, when leave might be given to the pleader to amend if the pleading be held insufficient and the court deem it proper to grant such leave.

APPEAL from a judgment of the Superior Court of Santa Barbara County. S. E. Crow, Judge.

The facts are stated in the opinion of the court.

Richards & Carrier, for Appellant.

H. H. Trowbridge, Hamilton A. Bauer, and Henley C. Booth, for Respondent.

ANGELLOTTI, J.—This is an appeal by plaintiff from a judgment that he take nothing by his action and that defendant recover its costs, given upon sustaining a demurrer to plaintiff's complaint after failure on plaintiff's part to amend.

The action is one instituted October 19, 1910, by plaintiff as special administrator of the estate of decedent to recover damages for the death of deceased, an employee of defendant, on October 23, 1909, alleged to have been caused by the wrongful neglect of defendant in furnishing defective and insufficient appliances with which to perform his work. It appeared from the allegations of the complaint that an application on plaintiff's part for general letters of administration of said estate was pending at the time of the institution of the action, that he had already been appointed special administrator by an order expressly empowering him to institute this action, and that letters of special administration had been issued to him in conformity with the order. A demurrer was interposed to the complaint on various grounds, among others being the ground that the complaint did not state facts sufficient to constitute a cause of action. The complaint did fail to state a cause of action, in that it failed to allege that the deceased left any heir, an allegation absolutely essential in an action of this character. (*Webster v. Norwegian Mining Co.*, 137 Cal. 399, [92 Am. St. Rep. 181, 70 Pac. 276].) It did allege that by reason of the death, "his heirs and personal representatives have suffered damage in the sum of ten thousand dollars," but there was no other allegation referring to any heir. The trial court sustained the demurrer, with leave to plaintiff to amend. Within the time given by the court and by stipulation for such amendment, plaintiff was duly appointed general administrator of the estate of deceased, general letters of administration were issued to him, and as such general administrator he regularly applied, on notice, to be substituted as plaintiff in place of the special administrator, and to be allowed to file an amended complaint, a copy of which proposed amended complaint was presented with his application. In the mean time, the time within which, under our statute of limitations, an action of this character may be instituted, viz., one year (Code Civ. Proc., sec. 340, subd. 3), had expired. Such time expired prior to the appointment of plaintiff as general administrator. Objection

was made to the proposed substitution and the filing of the amended complaint on two grounds, which were substantially, first, that plaintiff as special administrator was not authorized under the statutes to commence or maintain an action of this character, that the order of the court authorizing him to do so was beyond its jurisdiction and void, and that no proper action having been instituted within a year from the date of death of deceased, the alleged cause of action was barred by subdivision 3 of section 340 of the Code of Civil Procedure, and, second, that the proposed amended complaint set up a new and different cause of action from the one attempted to be declared by the original complaint, and therefore attempted to state a cause of action barred by the provisions of our statute just cited. The objection was sustained, and the application of plaintiff denied. Thereupon judgment was given for defendant as already stated.

1. As to the first objection made to the granting of plaintiff's application: If the special administrator was authorized to commence the action, the general administrator was entitled to be substituted as plaintiff. Section 1416 of the Code of Civil Procedure provides that the powers of the special administrator cease upon the granting of letters testamentary or of administration, and that "the executor or administrator may prosecute to final judgment any suit commenced by the special administrator."

The objection is based upon the character of this action, as defined by our decisions, and the language of our statute relative to the powers and duties of special administrators.

Section 377 of the Code of Civil Procedure gives a right of action for damages for the death of a person not a minor, caused by the wrongful act or neglect of another, to the "heirs or personal representatives" of the deceased. Section 1970 of the Civil Code as amended in 1907 [Stats. 1907, p. 119], purports to give a right of action, for and on behalf of "the widow, children, dependent parents, and dependent brothers and sisters," against an employer, for damages resulting from the death of an employee in certain cases, to "the personal representative of such employee." It is settled by the decisions that an action of the character authorized by section 377 of the Code of Civil Procedure is one solely for the benefit of the heirs, by which they may be compensated for the

pecuniary injury suffered by them by reason of the loss of their relative, that the money recovered in such an action does not belong to the estate but to the heirs only, and that an administrator has the right to bring the action only because the statute authorizes him to do so, and that he is simply made a statutory trustee to recover damages for the benefit of the heirs. (See *Webster v. Norwegian Min. Co.*, 137 Cal. 399, [92 Am. St. Rep. 181, 70 Pac. 276]; *Munro v. Pacific Const. etc. Co.*, 84 Cal. 515, 528, [18 Am. St. Rep. 248, 24 Pac. 303]; *Jones v. Leonardt*, 10 Cal. App. 284, 286, [101 Pac. 811].) The same is manifestly made to appear as to the persons mentioned therein by the language used in the provision of section 1970 of the Civil Code, hereinbefore referred to.

Section 1411 of the Code of Civil Procedure provides that in the event of delay in granting letters testamentary or of administration from any cause, and in other specific cases, "the superior court, or a judge thereof, must appoint a special administrator to collect and take charge of the estate of the decedent in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate." Section 1412 of the Code of Civil Procedure provides that the appointment must be made "by entry upon the minutes of the court, specifying the powers to be exercised by the administrator." Section 1415 of the Code of Civil Procedure provides that the special administrator "must collect and preserve for the executor or administrator," all the personal property of the decedent and demands of the estate, and must take charge of the real estate, "and for any such and all necessary purposes may commence and maintain or defend suits and other legal proceedings as an administrator." As already noted, section 1416 of the Code of Civil Procedure provides that the executor or administrator may prosecute to final judgment any suit commenced by the special administrator.

The theory of learned counsel for respondent is that the powers conferred by statute on a special administrator have to do solely with the collection and preservation of the property of the estate, that the superior court has no jurisdiction to confer a power not authorized by the statute, and that as the money recovered in such an action has been held not to belong to the estate, but solely to the heirs, the commence-

ment and maintenance of such an action is a matter not embraced within the powers conferred upon the special administrator.

We are of the opinion that the commencement and maintenance of such an action should be held to be within the scope of the powers and duties of a special administrator, as such powers and duties are defined by our statute. Although the moneys recovered in such an action do not constitute assets of the estate, they do constitute property which it is the right and duty of the personal representative of the deceased to collect for the benefit of the heirs, and the right to maintain an action for the recovery of the same is expressly conferred upon such personal representative. Section 1415 of the Code of Civil Procedure appears to us under any fair and reasonable construction to authorize the commencement and maintenance by the special administrator, when authorized by the order of court appointing him, of any suit or legal proceeding that might be commenced or maintained by the general administrator or executor. He for any of certain enumerated purposes "and all necessary purposes may commence and maintain or defend suits and other legal proceedings *as an administrator*" may do. Any action thus commenced by him may be prosecuted to final judgment by the general administrator or executor when appointed. No reason is apparent why the special administrator should be held to be excluded from the exercise of this power conferred upon general administrators, and in many cases it may be exceedingly necessary for the protection of the rights of the heirs interested that he should have such power, in view of the fact that such an action must be instituted within one year from the date of death of the deceased. It has been held that such an administrator may maintain the action given to the "executor or administrator" by section 1589 of the Code of Civil Procedure to recover when there is a deficiency of assets "for the benefit of the creditors" of the decedent, real estate conveyed by him during his lifetime with intent to defraud his creditors. (See *Forde v. Exempt Fire Co. et al.*, 50 Cal. 299.) It has also been held that such an administrator may maintain an action to quiet title to real property of the deceased, and that special as well as general administrators are included within the term "administrators" as used in section 1582 of the Code of

Civil Procedure. (*McNeil v. Morgan*, 157 Cal. 373, 380, [108 Pac. 69].) We can see no good reason why the same should not be held as to the term "personal representative" in section 377 of the Code of Civil Procedure and section 1970 of the Civil Code, and believe, as already stated, that by the language used in section 1415 of the Code of Civil Procedure it was intended to make it possible for a special administrator to commence and maintain any action that an executor or general administrator is authorized to commence and maintain.

2. We cannot see that any new or different cause of action from that attempted to be set up in the original complaint was attempted to be stated in the proposed amended complaint. By each it was attempted to state the cause of action given by the statute to the personal representative of the deceased for the benefit of heirs of the deceased, where his death is caused by the wrongful act or neglect of another. It would appear to be immaterial in this connection whether the personal representative in this case has the right of action by virtue of section 377 of the Code of Civil Procedure or by virtue of section 1970 of the Civil Code, as amended in 1907. In either event he has such a cause of action, under one section it being, in view of our decisions, for the benefit of heirs generally who are damaged, and under the other, it being for the benefit of certain designated persons only, including "dependent parents, and dependent brothers and sisters."

If the amended complaint did not attempt to set up a new and different cause of action from that attempted to be set up in the original complaint, there is nothing in the contention made by respondent based upon the statute of limitations. Where there is no attempt to state a new cause of action in an amended complaint, but merely the addition of matters essential to make the original cause of action complete, the amendment, though made after the expiration of the period of limitation, relates back to the time of the commencement of the action. This was expressly held by the district court of appeal for the first district in *Rauer's Law etc. Co. v. Leffingwell*, 11 Cal. App. 494, [105 Pac. 427], in which a rehearing was denied by this court, where the original complaint on a promissory note did not contain an allegation of nonpayment, an allegation absolutely essential to the statement of a cause of action. The amended complaint was filed after the stat-

ute would have run, if it had not been for the original complaint. It was held that it could not properly be said that no action was brought on the obligation until the amended complaint was filed, that the filing of the first complaint was the bringing of the action on the particular obligation and the filing of the amended complaint was simply a continuance of the same action upon the same obligation. It was recognized that there was some conflict of authority in other states, but the rule adopted was declared to be supported by the better reasoning. In *Frost v. Witer*, 132 Cal. 421, 427, [84 Am. St. Rep. 53, 64 Pac. 705], it was said, citing several authorities, that "where the cause of action is not changed, the time to which the statute of limitations runs is the filing of the original complaint." In *Tiffany's Death by Wrongful Act*, section 187, it is said: "The complaint or declaration may be amended as in other actions where the amended pleading does not state a new cause of action; and such amendment, although made after the expiration of the period of limitation, will relate back to the commencement of the suit. Thus, an amendment may be made . . . which adds an allegation that the deceased left a wife and children." This statement is supported by the decisions cited, viz.: *South Carolina R. R. Co. v. Nix*, 68 Ga. 572, and *Haynie v. Chicago etc. R. R. Co.*, 9 Ill. App. 105. In the latter of these cases the original complaint did not contain the necessary averment that the deceased left a widow or next of kin. The amended complaint, presented after the statute would have run had it not been for the original complaint, contained the necessary allegation in this behalf. It was held that no new cause of action was stated, that the effect of the amendment was simply to state truly the cause of action as it existed at the time of the commencement of the suit and was defectively stated in the original complaint, and that the objections of the defendant based on the statute of limitations should have been overruled. The case of *Lilly v. Railroad Co.*, 32 S. C. 142, [10 S. E. 932], may support respondent's claim in this behalf to some extent, but this case does not appear to us to be in accord with the doctrine of *Rauer's etc. Co. v. Leffingwell*, 11 Cal. App. 494, [105 Pac. 427], which we think states the better rule. We find no other case cited by respondent in this matter that requires notice.

3. Basing its contention upon the claim that this action must be held to be subject to the limitation in section 1970 of the Civil Code to the effect that it can be maintained only for the benefit of "dependent parents and dependent brothers and sisters" where there is no widow or child, it is urged here that the proposed amended complaint is fatally defective in not alleging that the parents of deceased, who are alleged to be his only heirs at law, were "dependent parents." This objection does not appear to have been made in the trial court. We are of the opinion that such an objection should not be considered on such an application as the one made to the trial court, and probably the same is true as to the objection based on the statute of limitations, which we have already considered on its merits. The usual and orderly way to test the sufficiency of an amended complaint is, in the first instance, by demurrer, after the same has been filed, when the questions presented in regard thereto may be considered and determined, and leave given to the pleader to amend if the pleading be held insufficient and the court deem it proper that the party should have such leave.

In view of what we have said, we are of the opinion that the trial court erred in not granting the application for substitution and leave to file an amended complaint.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Shaw, J., and Sloss, J., concurred.

[S. F. No. 6240. In Bank.—November 19, 1912.]

JOHN A. CLASSEN and LENA CLASSEN, his Wife,
Respondents, v. H. G. THOMAS et al., Appellants.

NEW TRIAL—WRITTEN OPINION OF TRIAL JUDGE—RECORD ON APPEAL.
A written opinion of the trial judge filed in determining a motion for a new trial constitutes no part of the record on appeal and cannot operate to limit the effect of the order as actually made.

ID.—LIMITATION OF GROUNDS OF ORDER MUST APPEAR THEREIN.—Any limitation of the grounds upon which such order is made must, to be effectual, be specified in the order itself.

ID.—ORDER ENTERED IN MINUTES GRANTING NEW TRIAL—WRITTEN OPINION SIGNED AND FILED BY JUDGE.—Where there is an order granting a new trial entered upon the minutes of the court, and also a paper signed and filed by the judge stating his reasons for his conclusion that a new trial should be granted, and ending with the words "The motion for a new trial will be granted," the latter paper is simply the written opinion of the judge, and in no sense an order granting a new trial. The order entered in the minutes is the only record of the court's action, and is to be measured by its terms.

MOTION for leave to file as a part of the record on appeal from an order of the Superior Court of Alameda County granting a new trial, a copy of a certain document claimed by the appellant to be the order appealed from. J. D. Murphy, Judge presiding.

The facts are stated in the opinion of the court.

T. C. Coogan, Coogan & O'Connor, J. A. Elston, and Snook & Church, for Appellants.

Mastick & Partridge, and Dudley Kinsell, for Respondents.

THE COURT.—This is a motion by appellants for an order allowing them to file as a part of the record on appeal, what they claim is a certified copy of the order from which their appeal is taken, which is the order granting a new trial in the above entitled action.

The record on appeal does contain a copy of an order made March 25, 1912, granting a new trial, as the same was entered on the minutes of the court, and the order as so entered was simply a general order granting a new trial, without the statement of any reason therefor, or the specification of the grounds upon which the same was based. The paper sought to be filed here as a copy of the order granting a new trial is obviously merely a copy of the signed opinion filed in the lower court by the trial judge in determining the motion for a new trial. It states at considerable length the reasons of the learned judge for his conclusion that a new trial should be

granted and ends with the words "The motion for a new trial will be granted." It is admitted that subsequent to the making of the minute entry of the order granting a new trial, a motion was made in the lower court for the correction of the same so that it would show that the new trial was not granted on the ground of insufficiency of evidence, and that this motion was denied.

It is conceded, as it must be under the decisions, that a written opinion of the trial judge filed in determining a motion for a new trial constitutes no part of the record on appeal and cannot operate to limit the effect of the order as actually made. Any limitation of the grounds upon which the order is made must, to be effectual, be specified in the order itself. We are satisfied that it must be held, under the decisions, that the paper signed and filed by the trial judge was simply a written opinion, and in no sense an order granting a new trial. In both *Newman v. Overland Pac. Ry. Co.*, 132 Cal. 73, [64 Pac. 110], and *Ben Lomond Wine Co. v. Sladky*, 141 Cal. 619, [75 Pac. 332], the paper signed and filed by the judge purported to order a new trial, the language in the former of these cases being "The motion for a new trial is granted." In such case it was held that where there is an order granting a new trial entered upon the minutes of the court, and also an opinion filed showing the reasons for the granting of the motion, and concluding with the words "The motion for a new trial is granted," the order entered in the minutes is the only record of the court's action, and is to be measured by its terms, and not by the reasons which the court may give for it. (See, also, *Weisser v. Southern Pacific Ry. Co.*, 148 Cal. 426, 7 Ann. Cas. 636, 83 Pac. 439[.])

The motion is denied.

Beatty, C. J., does not participate in the foregoing decision.

[S. F. No. 6205. In Bank.—November 20, 1912.]

**FRED MILLER, Petitioner, v. A. J. PILLSBURY et al.,
Respondents.**

EMPLOYERS' LIABILITY ACT—INJURY TO EMPLOYEE—ACT NOT APPLICABLE TO STATE AS EMPLOYER.—The state of California, as an employer, is not bound by the provisions of section 4 of the "Employers' Liability Act" (Stats. 1911, p. 796), to make compensation to an employee for personal injuries received by him in the course of his duties as an employee. There is nothing in the terms of the act which can be construed as indicating an intention on the part of the legislature to regard the act in its present form as binding on the state.

ID.—CONSTRUCTION OF ACT—ELECTION TO BE BOUND BY COMPENSATORY FEATURES OF ACT.—By the terms of the "Employers' Liability Act," its application is, generally speaking, made to depend upon the election of both parties to the contract of employment. In the absence of such mutual agreement the injured employee must have recourse to his claim for damages, or in other words must proceed to enforce the employer's "liability" as distinguished from the "compensation" which might be due under the act.

ID.—STATE NOT LIABLE FOR INJURIES TO EMPLOYEES.—A sovereign state is not bound at all to compensate an individual employee for injuries sustained while in its service, and no right of recovery in favor of such employee exists except by statute.

ID.—STATUTE PERMITTING STATE TO BE SUED STRICTLY CONSTRUED.—Statutes permitting the state to be sued are in derogation of its sovereignty and will be strictly construed. The "Employers' Liability Act" must, therefore, be strictly construed and in such manner, if possible, to preserve to the state its nonliability for injuries to those in its service.

APPLICATION for a Writ of Mandate directed to the Industrial Accident Board of the State of California.

The facts are stated in the opinion of the court.

Aaron L. Spiro, for Petitioner.

U. S. Webb, Attorney-General, for Respondents.

MELVIN, J.—Fred Miller, petitioner herein, applied to the respondents constituting the Industrial Accident Board of the

state of California, to hear his application concerning compensation for injuries received by said Miller in the course of his duties as an employee of the state. The board refused to hear said application upon the ground that the state is not an employer bound by the provisions of the "Employers' Liability Act." (Stats. 1911, p. 796.) An alternative writ of mandate was issued in which the board was required to hear Miller's application or to show cause why such action should not be had. Respondents appeared and demurred to the petition for a writ of *mandamus*. The questions raised being purely those which arise out of the interpretation of the "Employers' Liability Act," the controversy may be determined by our decision upon this demurrer.

By the terms of the statute its application is, generally speaking, made to depend upon the election of both parties to the contract of employment. In the absence of such mutual agreement the injured employee must have recourse to his claim for damages, or in other words must proceed to enforce the employer's "liability" as distinguished from the "compensation" which might be due under the act. By section 3 of the act the general responsibility of employers under the theory of compensation is fixed as follows:

"Liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall, . . . exist against an employer for any personal injury accidentally sustained by his employees, . . . where the following conditions of compensation concur:

"(1) Where . . . both the employer and employee are subject to the provisions of this act. . . .

"(2) Where . . . the employee is performing service growing out of and incidental to his employment. . . .

"(3) Where the injury is approximately caused by accident. . . .

"And where such conditions of compensation exist . . . the right to the recovery of such compensation . . . shall be the exclusive remedy against the employer for such injury or death. . . ."

The principal point of difference between petitioner and respondents arises over the interpretation of section 4, which is as follows:

“The following shall constitute employers subject to the provisions of this act within the meaning of the preceding section: (1) The state, and each county, city and county, city, town, village and school districts and all public corporations, every person, firm, and private corporation, (including any public service corporation) who has any person in service under any contract of hire, express or implied, oral or written, and who at or prior to the time of the accident to the employee for which compensation under this act may be claimed, shall, in the manner provided in the next section, have elected to become subject to the provisions of this act, and who shall not, at the time of such accident, have withdrawn such election, in the manner provided in the next section.”

Petitioner insists that it was the intention of the legislature by this section not only to divide employers into two classes, but to commit the state to an election of “compensation” as the method of satisfying claims for injuries to its employees. He believes that the section should be read as if a semicolon were placed after the words “all public corporations” and that so punctuated the section would designate two classes of employers, (1) the state and the specified public corporations and (2) persons, firms and corporations having people in their service and further that all employers in the first group would come under the compensation provisions, while those in the second class would come within the terms of the act only by election.

As a preliminary reason for a reading of the act in such manner as to sustain his views, petitioner’s counsel is at some pains to assure us that “the best modern judgment favors the theory of compensation” and “the state of California expects employers to elect compensation as preferable to liability.” Even if we concede his first proposition we cannot be swayed to any great extent by it unless the legislative branch of our government has expressed similar views because legislation is not one of the functions of this court. If, however, the state has indicated a policy in favor of such election by employers, we should of course be bound to consider that fact in our efforts to interpret statutes having reference to employers other than the state itself, but the state’s preference in that regard, even if for the purposes of argument we

admit its existence, would be of small value to us in construing the intention of the state, as expressed by the legislature, where the subject involved is the attitude of the state when it is itself an employer, because the sovereign is not bound at all to compensate an individual employee for injuries sustained while in its service, and no right of recovery in favor of such employee exists except by statute. (*Bourn v. Hart*, 93 Cal. 321, [27 Am. St. Rep. 203, 15 L. R. A. 431, 28 Pac. 951]; *Chapman v. State*, 104 Cal. 690, [43 Am. St. Rep. 158, 38 Pac. 457]; *Melvin v. State*, 121 Cal. 16, [53 Pac. 416]; *Denning v. State*, 123 Cal. 316, [55 Pac. 1000].) "Public rights will not be treated as relinquished or conveyed away by inference or legal construction. Statutes permitting the state to be sued are in derogation of its sovereignty and will be strictly construed." (Lewis's Sutherland Stat. Constr., sec. 558.) The statute before us must, therefore, be strictly construed and in such manner, if possible, to preserve to the state its nonliability for injuries to those in its service.

But petitioner calls our attention to two other sections of the act which, as he believes, when read in connection with section 4, compel the interpretation of that section which he favors. Section 6 defines the term "employee" as "(1) Every person in the service of the state, or any county, city and county, city, town, village or school district therein, and all public corporations, under any appointment or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city and county, city, town, village or school district therein or any public corporation, who shall have been elected or appointed for a regular term of one or more years, or to complete the unexpired portion of any such regular term. (2) Every person in the service of another under any contract of hire, express or implied, oral or written, . . . but not including any person whose employment is but casual and not in the usual course of the trade, business, profession or occupation of his employer." The above classification, he says, is based not upon any difference or distinction in the employees themselves but solely upon the classification of employers. Section 7 provides that: "Any employee as defined in subsection (1) of the preceding section shall be subject to the provisions of this act and of any act amendatory thereof. Any employee as defined in subsection (2) of

the preceding section shall be deemed to have accepted and shall . . . be subject to the provisions of this act. . . . if . . .

“(1). The employer . . . is subject to the provisions of this act, whether the employee has actual notice thereof or not; and

“(2). At the time of entering into his contract of hire, express or implied, with such employer, such employee shall not have given to his employer notice in writing that he elects not to be subject to the provisions of this act, or, in the event that such contract of hire was made in advance of such employer becoming subject to the provisions of the act, such employee shall, without giving such notice, remain in the service of such employer for thirty days after the employer has filed with said board an election to be subject to the terms of this act.”

Petitioner's position then is this: Employees are classified by section 6 simply as those hired by the two kinds of employers—public and private. By section 7 the public employee is given no election, and, therefore, petitioner reasons, section 7 was based upon the conclusion that by section 4 the legislature had already elected for the state the system of compensation. That is, according to petitioner, the statute was intended to classify employers and employees, and to impose the provisions for compensation automatically upon public employers and those in their service, and to permit the privilege of election to private employees and employers. “The legislature,” says counsel for petitioner, “could never have intended to mix this privilege of election—to allow election to both classes of employers and to only one class of employees.” But we see no incongruity in a situation denying to public employees the right of election. The state by virtue of its sovereignty may refuse all redress to its injured servants. When it elects to adopt the compensatory system, that becomes the only recourse of the employee. His election is not between such recourse and a suit for damages, but between the privilege extended to him and resignation from public service. All who seek employment under the state must be willing to accept it, if at all, under such terms as are offered. Returning to a consideration of section 4: If we so separate the section that the modifying clauses each beginning with the word “who” are made to modify only the nouns following the words “public corporations,” we take away from

the act its elective features so far as the state and the employees thereof are concerned and make it compulsory as to them. Such purpose on the part of the legislature is negatived by several circumstances. For example, we find the expression "who has any person in service under any contract of hire" in section 4. If petitioner is correct in his views these words apply only to the nouns "person," "firm" and private "corporation"; but we find essentially the same formula used twice in section 6—once in the definition of an employee of the state and again with respect to one who has been hired by a private person. Such use of the expression in the latter section would indicate that when it appeared in section 4 it was meant (as the punctuation would imply) to modify all of the preceding nouns. Another argument against petitioner's position is that the act contains no provisions for the payment of awards which might be in favor of an employee and against the state. Again it is noticeable that no machinery is supplied by the act whereby the services of the Industrial Accident Board may be invoked by the state. No officer is named as the proper functionary to receive service of notices mentioned in the act. None is authorized to represent the state in requesting examinations of employees or the hearing of any controversies. These omissions are significant. They indicate that the legislature did not regard the state as being bound by the act in its present form and therefore omitted to provide for those contingencies which would arise if, at some time in the future, the state should elect to place itself within the terms of the act, and which could then be met by appropriate legislation. We are convinced that the legislature did not intend the reading of section 4 which petitioner would have us give to it.

Let the demurrer be sustained and the writ discharged.

Lorigan, J. concurred.

HENSHAW, J., concurring.—I concur. It is apparent that this statute raises a doubt whether or not it was contemplated by its framers that the state should be subject to its provisions. Under fundamental and familiar principles of construction of statutes such as this the existence of the doubt is the solution of the inquiry. Wherever such a doubt

does exist the construction favors the sovereign. The sovereign is not brought within the scope of its own laws unless the intent that this should be done is made plainly to appear. This general rule of construction favoring the sovereign in case of doubt is applied to grants by the state, to statutes of limitation, to rights of action, and, indeed, to all laws and contracts concerning which it may be thought that the state is included or is a party. If, in truth, the state desires to subject itself to the law here in question it could and should do so in language of clear and unmistakable import.

Sloss, J., and Shaw., J., concurred.

[Sac. No. 1949. In Bank.—November 20, 1912.]

CHAMPION GOLD MINING COMPANY (a Corporation),
Appellant, v. THE CHAMPION MINES (a Corporation), Respondent.

VENDOR AND VENDEE—OPTION FOR PURCHASE OF MINING PROPERTY—FAILURE TO COMPLY WITH CONDITIONS AS TO PAYMENTS—NON-WAIVER OF DEFAULT—FORFEITURE.—Where an option for the purchase of mining property is conditional upon the vendee's making certain payments of the purchase price at stated intervals, and also payments of a certain percentage of the gross amount of any clean-up, to be applied to the purchase price, within ten days of the clean-up, and expressly provides in regard to such payments that "time is of the essence of this option," and that "upon the failure to make any payments above specified, or upon the breach of any agreement herein provided," all rights of the vendee shall cease and all payments theretofore made shall be forfeited, an inexcusable failure of the vendee to make a payment on account of such clean-up, when the same should be paid according to the agreement, terminates his rights under the option, and makes it impossible for him to enforce the same, in the absence of a waiver on the part of the vender. X

Id.—VENDEE IN POSSESSION—VENDOR'S RIGHT OF RE-POSSESSION.—Under such circumstances, it is immaterial that the vendee is in possession under the option. His right to the possession is only such as the contract gives, and if the contract substantially provides

that the right of possession shall cease upon the failure to perform a specified condition, the failure to perform such condition entitles the vendor to the immediate possession of the property. No notice by the vendor is essential to terminate the rights of the vendee. His default, unexcused and not waived, *ipso facto* terminates them.

ID.—SURRENDER OF POSSESSION BY VENDEE—TENDER OF PAYMENTS DUE AFTER DEFAULT—DEMAND FOR POSSESSION.—Where after such a default of the vendee, the corporate vendor, without having waived the default, by formal resolution of its board of directors, declared the option agreement to be terminated and directed its secretary to immediately take possession of the property, it became incumbent upon the vendee, unless the vendor receded from its determination, to surrender possession on demand therefor. A tender of all the amounts due, made subsequent to such default, could not avail the vendee, even if such tender was made prior to actual service of demand for possession.

ID.—WAIVER OF DEFAULT—UNACCEPTED PROPOSAL FOR WAIVER.—After the right of the vendor to retake possession had become fixed by reason of the vendee's default, its unaccepted proposal of certain terms and conditions upon which the default would be waived, including the payment of a larger amount of money than that due under the terms of the contract, and charges that the vendee would not have been required to pay thereunder, did not operate to waive the default.

ID.—ACTION BY VENDEE TO RECOVER POSSESSION—PLEADINGS—FAILURE TO CONSENT TO VENDOR'S REPOSSESSION.—An action by the vendee, after the vendor had taken possession of the property on account of such default, brought solely to recover its possession, to obtain an accounting as to its proceeds while in the vendor's possession, and to recover damages caused by the alleged unlawful withholding, is not an action of forcible entry, and the failure of the defendant to deny the allegations of the complaint showing that the plaintiff did not consent to the taking of possession by the defendant is immaterial.

ID.—RECOVERY OF PURCHASE PRICE—ENCUMBRANCE ON VENDOR'S TITLE. In such action, the right of the vendee to recover a part payment of the purchase price of the property is not in issue, nor can it avail itself of the fact that the vendor's title to the property was encumbered.

ID.—VENDEE NOT ENTITLED TO POSSESSION WITHOUT COMPLIANCE WITH CONTRACT.—Notwithstanding the title of such vendor is defective or encumbered, the vendee is not entitled to remain in possession without complying with the conditions of the contract as to payment.

JURY TRIAL—PRACTICE—DIRECTING VERDICT FOR DEFENDANT.—On a trial by jury, it is proper for the court, after the evidence on the

part of the plaintiff was closed, to direct a verdict for the defendant, where the evidence is such that if the case had been allowed to go to the jury, and it had found in favor of the plaintiff, the court would have been compelled, on motion to that effect, to set aside the verdict and grant a new trial, on the ground of insufficiency of evidence to sustain the verdict.

APPEAL from a judgment of the Superior Court of Nevada County and from an order refusing a new trial. George L. Jones, Judge.

The facts are stated in the opinion of the court.

J. M. Walling, for Appellant.

Metson, Drew & Mackenzie, Fred Searls, and Horatio Alling, for Respondent.

ANGELLOTTI, J.—This is an appeal by plaintiff from a judgment in favor of defendant, and from an order denying its motion for a new trial.

The action was one to recover possession of certain mining property and damages for the detention thereof. A jury was impanelled to try the case. After the evidence on the part of the plaintiff was closed, the trial court, on the motion of the defendant, directed the jury to return a verdict for the defendant. This was done, and thereupon judgment was given for the defendant. The action of the trial court in thus instructing the jury is alleged to have been erroneous, it being claimed that plaintiff made a sufficient case to support a verdict in its favor.

Considering the evidence in the light most favorable to plaintiff, the facts shown are substantially as follows:

Plaintiff is the assignee of all the rights of W. S. Phillips, George E. Fitzgerald, and W. T. Stewart under a contract executed by them and defendant corporation on December 18, 1909. By this contract defendant corporation granted to said Phillips, Fitzgerald, and Stewart "the option to purchase all of its mines and mining properties situated in the county of Nevada, state of California, at the total price of \$347,000 upon the following terms and conditions, to wit:" The purchase price was to be paid in installments, nine thousand five

hundred dollars on or before January 1, 1910, twelve thousand five hundred dollars on or before July 1, 1910, and other installments on January 1 and July 1 of each year until the final installment of one hundred and thirty-seven thousand dollars, which was to be paid on or before January 1, 1913. Possession of the property was to be delivered to Phillips and his associates upon the making of said first payment of nine thousand five hundred dollars, and a deed was then to be placed in escrow by defendant conveying to them a clear, unencumbered, and marketable title to said mining property. Phillips and his associates were to have the right to operate the mines, they agreeing to expend a sum not less than one hundred thousand dollars in the development and operation of the mines during the first year, and to pay defendant ten per cent of the gross amount of bullion obtained at clean-ups, which amounts were to be applied upon the installments upon the purchase price. They were "to pay all taxes on said properties," and to keep the same free from all liens and encumbrances arising or growing out of their possession of said mines or the operation thereof. It was provided that "any of the above payments, other than the said first payment of \$9,500, may be paid within ten days after the above specified dates, otherwise in all particulars, time is of the essence of this option." It was further provided as follows: "Upon the failure to make any of the payments above specified in accordance with the terms hereof, or upon the breach of any of the agreements herein provided, all payments theretofore made shall be forfeited and said corporation shall have the right to immediately re-enter and take possession of said properties and receive return of said deed placed in escrow."

The first payment (nine thousand five hundred dollars) having been made, plaintiff went into possession of said property on or about January 12, 1910, and proceeded with the development and operation of said mines, and continued in such possession and operation until April 26, 1910, when defendant took possession, claiming that all rights of plaintiff under said contract had terminated. It was to recover such possession that this action was brought by plaintiff on July 8, 1910, two days prior to the day on which it would be

in default for a failure to make the second payment, one of twelve thousand five hundred dollars, due July 1, 1910.

At the time of the first payment, defendant placed in escrow, in the Bank of California, a deed of said property subject to the terms and conditions of said agreement. The property was at that time, according to an undenied allegation of the complaint, encumbered by a mortgage placed thereon by defendant "in a sum of money in excess of" thirty thousand dollars, and according to the complaint and the proof, by a lien for unpaid state and county taxes for the year 1909, amounting to \$1,477.64, being the second installment of the taxes for said year, payable when the contract was executed but not delinquent until the fourth Monday of April, 1910.

On April 19, 1910, plaintiff had been operating the mines for over two months, and had extracted at clean-ups bullion of the value of about twenty thousand dollars, but had not paid any portion of the ten per cent thereof to defendant. It cannot successfully be disputed that plaintiff's evidence shows that on April 1, 1910, at least \$658.69 was due defendant under the provision requiring the payment of ten per cent of the gross amount extracted at clean-ups. Indeed, according to Fitzgerald's written acknowledgment on April 2, 1910, the amount due April 1st was \$975.58.

Fitzgerald was at all times the general manager of plaintiff in this state, and one Thomas A. Kelly was superintendent of the mine and in possession thereof for the plaintiff. On March 17, 1910, defendant sent a formal letter to Fitzgerald, as such manager, signed by its president and secretary and attested with its corporate seal, notifying him that plaintiff was delinquent in the matter of paying to defendant ten per cent of the clean-ups as made. The letter contained the following statements, among others not material here: "On February 7, 1910, we wrote you in reference to this matter. You replied on February 9, 1910, promising to attend to this matter. You have now been in possession of the property for about two months. We know that you have had very many clean-ups, both of tributers and of company rock, amounting to several thousand dollars. According to our contract, we are entitled to a full statement and ten per cent

of the gross clean-ups. As you have not replied to our letter of February 7th, and have given us no statement and no payments, we hereby wish to inform you that we shall hold you strictly accountable to the letter and spirit of the contract. Kindly send us at once a statement of the total amount you have taken from the mines since they have been in your possession, and send us a check for ten per cent of that amount. We do not desire in any way to hinder you in your operations, but we must insist, and do insist, upon a strict compliance with the contract; if said statement, accompanied by a check for ten per cent of the amount taken out, is not received by us, we shall immediately take steps to take possession of the property, as provided in the contract. Kindly understand we do not wish to hamper you in any way, but we do insist that you must keep up to the letter and spirit of the contract. We hereby demand, as is our right, at the close of each and every month, you send us a verified statement of the total product for the month, and send us a check for ten per cent of said amount." On April 2d, Fitzgerald sent by mail to defendant's president at San Francisco, a draft on one Phillips in Chicago for \$975.58, with a statement showing such amount to be the amount due on clean-ups. On April 4, 1910, defendant by letter acknowledged receipt of the statement and draft, and said it would forward the same for collection, trusting it would be honored when presented. It was duly presented to Phillips for payment, but payment was refused by him. On April 13, 1910, the secretary wrote Fitzgerald as such manager that he had been directed to inform him that the draft had not been accepted and "is being returned unpaid, and also to ask him to state by return mail what he proposed to do in these matters, and what might be expected in the future." On April 14, 1910, Fitzgerald replied to this letter, expressing great surprise that the draft should not have been honored, and promising that he would pay all amounts due in a short time. A telegram was produced on the trial showing that he had been expressly authorized by Phillips to draw on him for "five hundred" only. On April 18, 1910, he again wrote defendant's president inclosing on account of royalties his personal check for five hundred dollars on the Citizens Bank of Nevada City. This check was never paid, being marked "No funds," Fitzgerald stating that

he had funds in the bank when he drew the check, but that he withdrew the same before its presentation for the purpose of preventing payment.

On April 19, 1910, at a regular meeting of the board of directors, the following resolution was adopted, viz.:

“Whereas, W. S. Phillips, George E. Fitzgerald and W. T. Stewart, have broken that certain contract, made and entered into between the said parties and The Champion Mines, on the 18th day of December, 1909.

“Now, Therefore, it is hereby resolved, that said agreement be, and it is hereby terminated and canceled, and B. W. Shoecraft, secretary of this corporation, be and he is hereby authorized and directed for and on behalf of this corporation, and as its act and deed, to immediately take possession of all the properties of this corporation covered by said contract.”

On April 20th or 21st, 1910, defendant's president and secretary went to the mine, and the secretary there delivered to Mr. Kelly, the superintendent in charge, a duly certified copy of this resolution. According to Kelly's testimony, he told them they would have to see Fitzgerald about it, and left the paper on the desk or handed it to the secretary. Fitzgerald came into the office while they were talking. According to Fitzgerald's testimony the subsequent proceedings were as follows: The president of defendant told him he had come to take possession of the mine, because, among other reasons, the royalties had not been paid, and he, Fitzgerald, at once offered to pay all royalties due. The president retired for a consultation with the secretary, and on his return said: “I don't want to be too hard on you, Fitz. If you will pay me \$1,500 to \$2,000 in royalties and \$1,600 in taxes, I will let you off.” The tax thus referred to was that we have spoken of, being the second installment for the year 1909. Fitzgerald declined to pay anything on account of the taxes, but tendered the royalties demanded, which the president refused to accept. At the close of the interview either the president or secretary gave to Fitzgerald the certified copy of the resolution we have referred to. According to Kelly, the president said he had not then received the five hundred dollar check sent April 18th, but that if it had been forwarded, Fitzgerald would be likely to receive it back by return mail. The officers of defendant left, and on April 26th they returned and took

possession of the property without plaintiff's consent, and defendant has ever since been operating the mine.

Plaintiff was entitled, of course, to continue in the possession and operation of the mining property as long as it fully performed the conditions imposed upon it by the agreement between its assignors and defendant.

The claim that there was a default in the matter of the payment of taxes was discussed in the opinion heretofore filed in this case by Department One of this court, and it was concluded that plaintiff was not required to pay the tax in question and that therefore there was no default in that matter. We adhere to the conclusion then reached in this regard, but as will appear from what follows, this conclusion is immaterial in the disposition of this appeal, and it will not be necessary to here set forth the reasons for that conclusion.

It was assumed in the department opinion, we are satisfied correctly, that one of the conditions imposed on plaintiff in the matter of remaining in possession and operating the mining property was the payment to defendant of ten per cent of the gross amount of each clean-up, within ten days of the making of the clean-up, the provision for ten days' grace as to payment being held applicable to "clean-up payments." The provisions of the agreement in this behalf may be held to have been waived by defendant to the extent stated in its formal letter of March 17, 1910, which stated that "we hereby demand, as is our right, at the close of each and every month, you send us a verified statement of the total product for the month, and send us a check for ten per cent of said amount." But there was nothing to indicate a waiver to any greater extent. Indeed, the letter was explicit to the effect that there must be a strict compliance with the contract, and that unless the amount already due was at once paid, and payments were made promptly at the close of each month on account of the clean-ups during such month, defendant would consider the contract at an end and would take possession of the property. Nothing was ever said or done by defendant to indicate that it would not maintain this position or that it would excuse any further delay in the matter of payments. And up to April 26, 1910, when a certified copy of the resolution of defendant's board of directors declaring the agreement terminated was served upon plaintiff's superintendent, neither any

payment nor tender of payment on account of such clean-ups had been made, unless the check for five hundred dollars dated April 18, 1910, which does not appear to have been accepted, and which was not, in fact, received by defendant until after April 19th, be considered a tender of the amount specified therein, an amount not sufficient to pay the percentage on clean-ups admittedly due not later than April 11, 1910.

The relative rights of the respective parties under the contract before us are well established by the decisions in this state. The plaintiff, as successor of Phillips, Fitzgerald, and Stewart, held, *upon certain specified conditions*, the option to purchase the mining property for three hundred and forty-seven thousand dollars, with the right to possess such property and operate the mines thereon after the first payment on account of the purchase price had been made, during the life of the option, and having made such first payment was in the possession of and operating the property. Among the conditions were some requiring the making of certain payments within ten days of certain specified dates, and one requiring the payment of ten per cent of the gross amount of any clean-up (to be applied on the purchase price) within ten days of the making of the clean-up. Although it is held that where mines or mining properties are the subject of contract, time is of the essence, independent of any express stipulation inserted in the instrument (see *Skookum Oil Co. v. Thomas*, 162 Cal. 539, [123 Pac. 363]), it was expressly provided in regard to the payments that "time is of the essence of this option," and it was substantially provided that "upon the failure to make any payments above specified, or upon the breach of any agreements herein provided," all rights of the holders of the option shall terminate and all payments theretofore made by them shall be forfeited. Such is the clear effect of the provisions contained in the agreement. Under such circumstances it is well settled that an inexcusable failure on the part of the holder of the option to make a payment when the same should be paid according to the agreement, terminates his rights under the option, and makes it impossible for him to enforce the same, in the absence of waiver on the part of the other party. (See *Oursler v. Thacher*, 152 Cal. 739, [93 Pac. 1007]; *Glock v. Howard*, 123 Cal. 1, [69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713].)

It can make no difference that the vendee is in possession under the option. His right to the possession is only such as the contract gives, and if the contract substantially provides that the right of possession shall cease upon the failure to perform a specified condition, the failure to perform such condition entitles the owner to the immediate possession of the property. (See *Hegler v. Eddy*, 53 Cal. 597.) The evidence in the case at bar was not such as would sufficiently support a conclusion that the failure of plaintiff to make this payment on or before April 11th was in any way excusable, or that defendant prior to the adoption of its resolution of April 19, 1910, had in any way waived the making of such payment at the prescribed time, or waived any of its rights in consequence of such nonpayment. Plaintiff's rights under the contract were therefore on April 19, 1910, at an end, unless defendant elected to waive plaintiff's failure to comply with the terms thereof. Instead of doing anything of this kind, it, by its board of directors, adopted a formal resolution declaring the agreement to be terminated, and directing its secretary to immediately take possession of the property. We do not understand that any notice was essential to terminate plaintiff's rights under the contract. (See *Commercial Bank v. Weldon*, 148 Cal. 601, 608, [84 Pac. 171].) Its default, unexcused and not waived, *ipso facto* terminated those rights, and practically the only effect of the resolution was to express the determination of defendant corporation not to waive such default and that the contract was, by reason of the default, terminated, and to authorize the designated officer for and in its name to retake possession. Unless defendant elected to recede from this determination, nothing remained for plaintiff to do but to surrender possession on demand therefor. A tender of all the amounts due, made subsequent to such default, could not avail it (*Skookum Oil Co. v. Thomas*, 162 Cal. 539, [123 Pac. 363], even if such tender was made prior to the actual service of demand for possession. Even if we assume that what was said by defendant's president to Fitzgerald at the time of serving the notice on him could be taken as binding on the corporation, clearly nothing was said by him except to indicate certain terms and conditions upon which the corporation would waive the default. The right of defendant to possession being already

fixed and established, it had the right to prescribe any terms it saw fit as the condition upon which it would waive and forego that right, and reinstate plaintiff under the contract. It is entirely immaterial that the payment demanded as such a condition was larger than the amount that would be due under the terms of the contract, and included charges that plaintiff would not have been required to pay thereunder. Plaintiff did not see fit to accept the offer made by defendant's president, and that officer did not attempt to waive any of the rights of his corporation in the matter.

From what we have said it is clear that if the case had been allowed to go to the jury, and the jury had found in favor of plaintiff, the court would have been compelled, on motion to that effect, to set aside the verdict and grant a new trial, on the ground of insufficiency of evidence to sustain the verdict. The trial court did not therefore err in directing a verdict for defendant.

In view of what we have said the other points made in the briefs of counsel for plaintiff require little discussion.

The denials and affirmative allegations contained in the amended answer made sufficient issues as to the alleged performance by plaintiff of the condition entitling it to remain in possession of the property, and sufficiently showed the determination of defendant to consider the contract at an end by reason of the default alleged, and a taking of possession in pursuance of that determination. The failure to deny the allegations of the complaint as to the manner in which defendant obtained possession of the property from plaintiff's employees was of no importance. This is not an action of forcible entry, but one brought long after the time within which such an action could be brought, and the only effect of the allegations of the complaint in this regard was to show that plaintiff did not consent to the taking of possession by defendant. The demurrer to the answer was properly overruled.

Even if it be assumed, as claimed by plaintiff, that the pleadings are in such condition as to prevent defendant from asserting in this action that it is entitled to retain the nine thousand five hundred dollars paid to it by plaintiff, a matter we by no means concede, nevertheless plaintiff was not entitled to recover such money in this action, which is brought by plaintiff solely to recover possession of the mining prop-

erty, and to obtain an accounting as to the proceeds obtained by defendant while wrongfully in possession, and to recover damages caused plaintiff by the alleged unlawful withholding. No other relief was suggested in the complaint by either allegation or prayer, and the right of plaintiff to recover the money was not in issue.

The fact that the title of defendant was encumbered by a mortgage for thirty thousand dollars, and by the lien for the taxes already referred to is of no avail to plaintiff in this action, involving, as it does, only the question of the right to the possession and operation of the mining property. Even if the title of defendant were in any way defective or encumbered, nevertheless plaintiff was not entitled to remain in possession without complying with the conditions as to payment. The principle involved is discussed in the opinion in *Garvey v. LaShells*, 151 Cal. 526, 531, [91 Pac. 498], and the cases therein cited.

There is no other matter requiring notice.

The judgment and order denying a new trial are affirmed.

Sloss, J., Henshaw, J., Lorigan, J., Melvin, J., and Beatty, C. J., concurred.

SHAW, J., dissenting.—I dissent. The opinion of the majority is based on the proposition that the plaintiff's right to pay the amount due for "clean-up" royalties and thereby to continue in possession of the mine had terminated before the offer of April 20th to pay said royalties was made. I think that the evidence shows a waiver of the forfeiture growing out of the failure to pay said royalties and that in holding that it does not, the majority opinion fails to consider the true rules of law applicable to such cases. The summary of Professor Pomeroy in his work on contracts has been accepted for many years as a correct statement of the law on this subject. It is as follows: "The one who is entitled to insist upon a punctual performance by the other or else that the agreement be ended, may waive his right and the benefit of any objection he might raise to performance after the prescribed time, either expressly or by conduct; and his conduct will operate as a waiver when it is consistent only with a purpose on his part to regard the contract as still subsisting, and not ended

by the other's default." (Pomeroy on Contracts, sec. 394.) In section 395, he states the well established rule that when the right to a forfeiture is once waived, time is no longer essential as to the payments included in the waiver, that it cannot again be made essential as to them, except by a notice again fixing the time of the payment, and that the time so fixed must be reasonable under all the circumstances. In section 397, he proceeds to say that the time thus newly fixed by notice may again be waived by conduct, and that "if the time is once allowed to pass and the parties still go on negotiating for the completion of the purchase, this conduct amounts to a waiver, and time is then no longer essential."

With these rules in view the evidence sufficiently establishes the waiver. As the trial was before a jury and the court directed a verdict for the defendant, the rule prevails that every fact in issue favorable to the plaintiff, of which there was substantial evidence, must be considered as proven and evidence inconsistent therewith must be disregarded. Forfeitures are not favored either in law or equity. In considering the effect of the evidence due weight must be given to both of these propositions.

While it must be conceded that the language used in the agreement clearly includes the clean-up payments among those as to which time is essential, it is at least doubtful from the whole case and from the nature of these payments whether the parties at the time really understood that it had that effect. The main object of the provision that time was essential and that a forfeiture would result from a failure to pay promptly, obviously was to secure prompt payment of the installments of the price agreed upon. The clean-up payments were in fact advance payments on those installments and the contract so declares. It must be admitted that where payments as to which time is made essential are for very small amounts, becoming due at irregular intervals, and both the amounts and dates of payment are determined by subsequent events brought to pass in part by the acts of third persons and are not fixed in advance by the contract itself, it would be much more probable that prompt payment, or forfeiture for nonpayment, would be waived than it would be with regard to regular installments of the price to be paid at times fixed by the agree-

ment. Consequently, slighter evidence would suffice to establish such waiver.

The contract fixed no definite time for making clean-up payments. The amounts thereof depended on the amount of precious metal obtained. Both amount and date became known for the first time when the clean-up was made. At the time of the sale and until the supposed forfeiture, the operations at the mine were largely carried on by "tributers," persons taking out ore independently for a percentage of its value. Clean-ups were made for their benefit as the ore was mined. By the language of the contract payment of the royalty upon each of these clean-ups was to be made within ten days thereafter and a failure by the plaintiff as to any one of them, would, *ipso facto*, forfeit all of the plaintiff's rights. According to the testimony of Fitzgerald the plaintiff had paid twelve thousand five hundred dollars on the price, and it had a very substantial interest at stake. Four or five "tributers" clean-ups were made between February 1 and March 4, 1910, but the respective dates and amounts were not proven. The following are the dates of other tributers clean-ups shown and the amounts are the royalties due thereon: March 4, \$43.02; March 7, \$91.22; March 11, \$26.42; March 14 (3 clean-ups), \$51.17; March 17, \$5.47; March 23, \$86.23; March 20, \$2.08; March 30, \$11.97; April 1, \$3.94; April 7, \$28.72; April 8 (2 clean-ups), \$66.67. I mention these to show the irregular dates and the varying amounts of royalty payments. The plaintiff's manager testified that the nature of the business was such that it was a very difficult matter to ascertain at any time the royalties that were then due. None of the above amounts were paid, and, under the contract, at the expiration of ten days from each clean-up a forfeiture of all of plaintiff's interest would have occurred if there had not been a waiver by the defendant. Obviously there was such waiver as to all clean-up royalties that became due on or before March 17th, the date of the letter of the defendant to plaintiff mentioned in the majority opinion. This letter was received by Fitzgerald, the manager of the plaintiff, on March 18th. The statement therein demanded of him was not made until April 2d. He then rendered the statement accompanied by a draft to cover the royalties shown to be due thereby, although, in fact, the

ten days' grace had not expired as to all of them. The evidence shows that this draft was drawn in good faith and with the belief that it would be paid. It was not paid on presentation and thereupon, under date of April 13th, defendant wrote to Fitzgerald, informing him that the draft had not been accepted and that the "board of directors desire you to state by return mail what you propose to do in these matters and what may be expected in the future." Fitzgerald received this letter on April 14th. He immediately replied saying that he would begin payments on the royalties on April 20th, by applying thereon all the proceeds of tributers' rock, and that he expected to pay it all up in four weeks, as the ore was becoming more valuable. On April 18th, Fitzgerald sent to defendant his personal check for five hundred dollars to apply on the amount due from plaintiff on royalties. On April 19th, before the last check was received, the defendant's board of directors made and adopted a resolution declaring the agreement ended and authorizing its secretary to immediately take possession of the mine. No officer or agent of the plaintiff was present and it had no knowledge of this action at the time. It is obvious that the resolution could not of itself affect the plaintiff's rights. A copy of it was served on the plaintiff on April 20th, and immediate possession of the mine was then demanded. Plaintiff's manager thereupon offered to pay all royalties then due, which defendant refused to accept unless plaintiff also paid fifteen hundred dollars in taxes which it was not bound to pay. Plaintiff was allowed to continue in the possession and operation of the mine until April 26th. No previous notice had been given that this demand for possession would be made on April 20th, or at any other time.

The defendant's letter of March 17th clearly shows a waiver of the forfeiture for all the defaults which had then occurred. It even went further and proposed a distinct alteration in the terms of the contract,—namely, that thereafter, instead of paying the royalty on each clean-up as it became due, the plaintiff should render an account at the close of each month and pay the royalties monthly according to such account. This alteration was accepted and acted upon by the plaintiff and this conduct must be accepted as a waiver of the strict terms of the contract with respect to royalties on clean-ups. In the letter

of April 13th, after the default in the payment of the draft, the defendant did not insist upon the right of forfeiture which, technically, had accrued to it by reason of the dishonor of the draft and the failure to pay the amount due for the March royalties. On the contrary, it desired plaintiff to say what it proposed to do in the matter and to state what it could expect in the future. Defendant evidently then regarded the contract as still subsisting, and not as having terminated with the default, and the language of the letter plainly shows a desire to negotiate for its future performance. This, under the doctrine above stated, was a clear waiver of the previous defaults. If this case had been submitted to a jury and a verdict for the plaintiff rendered, this waiver would have been supported by the evidence, and it should be regarded here as an established fact. Under the change in the terms made by the letter of March 17th no additional payment would become due until May 1st. In the mean time none would become due so as to cause a forfeiture, unless by some notice or demand the defendant informed the plaintiff that after a reasonable time it would no longer stand by the proposition of March 17th.

The result is that the time, having been once allowed to pass for the March payment, became no longer essential as to that payment, and it could not again be made essential, except by notice fixing a new date upon which such payment would be demanded or a forfeiture declared. Payment was not wholly waived, but payment at the exact time was waived, when the defendant, in effect, asked plaintiff to negotiate for a future date. Plaintiff having replied by a promise of payment at an indefinite time, it was necessary for the defendant, if it still intended to insist upon a forfeiture on account of such payment, to fix a new date and give the plaintiff notice thereof a reasonable time in advance. It could not work a forfeiture by demanding immediate possession on account of a prior default which it had waived in this manner.

The offer of the plaintiff to pay the amount due, being made at the time of the unannounced demand for possession, was in time. It should have been accepted by the defendant. The demand of the defendant for more than was due was, in effect, a rejection of the offer. The defendant had no right to take possession and in doing so it committed a wrongful act. There is nothing in the evidence to show that its possession became

rightful before this suit was begun. It follows that the court erred in directing the jury to return a verdict for the defendant. For these reasons I think the judgment should be reversed.

[Sac. No. 1986. In Bank.—November 20, 1912.]

THE SAN JOAQUIN AND KINGS RIVER CANAL AND IRRIGATION COMPANY, INCORPORATED (a Corporation), Appellant, v. JAMES J. STEVINSON (a Corporation), et al., Respondents.

EMINENT DOMAIN—WATER—PUBLIC USE.—The use of water for sale, rental, and distribution to the public generally is a public use.

ID.—POWER TO EXERCISE MUST BE GRANTED.—No person or corporation can exercise the power of eminent domain except by a grant from the state.

ID.—WATER MAY BE CONDEMNED FOR PUBLIC USE.—Section 1238 of the Code of Civil Procedure, authorizes the exercise of the right of eminent domain for the condemnation of water to be devoted to such a public use.

ID.—PLEADING—LOCATION OF CANALS—PLACE OF USE OF WATER SOUGHT TO BE CONDEMNED—TERRITORY TO BE SERVED.—A complaint to condemn water for public use, which alleges that the plaintiff owns two large canals, one seventy-two miles long and the other fifty-two miles long, leading out of the San Joaquin River into the country lying west of the river and extending from the county of Fresno through the county of Merced into the county of Stanislaus the point of its beginning being described with certainty; that it also has distributing canals leading therefrom to the lands in the vicinity, for convenience of distribution, and maintains a dam in the river to divert the water therefrom into the canals; that by this means it has been diverting water from the river and carrying the same into canals and selling it for irrigation, watering of stock, and domestic uses "to the inhabitants of the counties of Fresno, Merced, and Stanislaus," and that it desires to divert from said river into said canals an additional flow of five hundred cubic feet per second and to carry the same in said canals and devote it to the same public use in the same manner, and that along its canals there is sufficient land upon which irrigation is necessary, the owners of which desire to use said water, to consume said additional quantity, sufficiently shows the situation and location of the canals, the place of use of the additional water sought to be condemned, and the territory to be served therewith.

ID.—WATER TO BE USED FOR “FARMING IN NEIGHBORHOODS.”—Such complaint sufficiently shows that the plaintiff desires to take the additional water-rights sought to be condemned in behalf of the public use indicated by subdivision 4 of section 1238 of the Code of Civil Procedure by the words “supplying mines and farming in neighborhoods with water.” The fact that there may be several separate farming neighborhoods along the canals of the plaintiff does not destroy its right of condemnation.

ID.—SUFFICIENT SHOWING OF SITUS OF PROPOSED USE.—In order to maintain an action to condemn water for public use, it is not required that the boundaries of the territory to which it is to be dedicated shall be alleged and proved with absolute certainty. The nature of the use is such that this cannot be done. The location of the proposed canal being shown, the *situs* of the proposed use is thereby fixed with sufficient accuracy.

ID.—WATER UNNECESSARILY RUNNING TO WASTE.—A right to divert water to be allowed unnecessarily to run to waste cannot be acquired, even by a judgment of condemnation. Such judgment, when given, would afford no protection for such a taking.

ID.—CONDEMNATION FOR USE OF CANALS AND CONDUITS—TAKING OF WATER TO BE CARRIED THEREIN IMPLIED.—The use described in such complaint is also one for which the right of eminent domain is given in subdivision 3 of that section, as “canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes for conducting or storing water for the use of the inhabitants of any county . . . and all other public uses for the benefit of any county . . . or the inhabitants thereof, which may be authorized by the legislature.” Such language necessarily implies, not only that property may be condemned for the canals and conduits mentioned, but that water may also be taken to be carried therein.

ID.—CONSTRUCTION OF STATUTE CONFERRING RIGHT OF EMINENT DOMAIN—SUPPLY TO ALL INHABITANTS OF COUNTY NOT REQUIRED.—Such subdivision of that section is to be liberally construed, with a view to effecting its objects and to promote justice, and so as to avoid absurd results. So construed, the subdivision must be held to confer the right of eminent domain for the use mentioned, notwithstanding the person in charge of the use does not propose to supply *all* of the inhabitants of the county with the water sought to be condemned, if the proposed use is for a part of the inhabitants thereof comprising a sufficiently large proportion of the inhabitants capable of using it in the particular territory as to destroy its character as a private use.

ID.—SUPPLYING INHABITANTS OF PARTICULAR SECTION OF COUNTY—EQUAL RIGHT OF ENJOYMENT.—The furnishing of water generally to the inhabitants of a particular section of a county is a public use, and it is not necessary, in order to so constitute it, that the water

should be obtainable by all the inhabitants of the immediate territory to which it is taken. It is sufficient if all who are capable of enjoying it have an equal right to it.

ID.—JUDICIAL NOTICE—IMPOSSIBILITY OF SERVING ALL INHABITANTS OF COUNTY BY ONE WATER SYSTEM.—The courts will take judicial notice of the fact that, with the possible exception of the city and county of San Francisco, there is no county in the state in which it is practicable to serve all of its inhabitants with water by means of one system of works.

ID.—PLEADING—ALLEGATIONS AS TO TERRITORY TO BE SUPPLIED—VARIANCE.—Notwithstanding the general allegations of the complaint that the water is to be devoted to sale and distribution to the inhabitants of Fresno, Merced, and Stanislaus counties, the specific facts alleged show that the water is to be taken only to the lands on the west side of the San Joaquin River, and proof of such specific facts does not constitute a substantial variance between the allegations and proof as to the extent of the use proposed.

ID.—CORPORATIONS—POWER TO CONVEY WATER FOR PUBLIC USE—ARTICLES OF INCORPORATION.—A foreign corporation, whose articles of incorporation state that it is formed and empowered to construct canals in California leading from the San Joaquin River, for the carriage of passengers and freight, and for the purpose of irrigation, and to supply water to the inhabitants of cities and towns in California, is authorized to carry water in its canals to be devoted to public use for the purposes of irrigation, navigation, and commerce.

ID.—FOREIGN CORPORATIONS—POWER TO DO BUSINESS IN CALIFORNIA.—Foreign corporations have always been allowed to enter this state and do any business therein that is within their corporate powers. Their right to do so has been recognized and sanctioned by our statute ever since April 4, 1870 (Stats. 1869–70, p. 881). For all purposes of every business within their capacity they are classed with domestic corporations, provided they comply with the statutes allowing them to do business here, and a statute which by necessary construction confers powers upon corporations in general is to be understood to confer that power upon foreign corporations doing business here as well as upon domestic corporations.

ID.—FOREIGN CORPORATION MAY EXERCISE RIGHT OF EMINENT DOMAIN.—Under section 1001 of the Civil Code, such a foreign corporation may acquire property by condemnation in this state for any public use specified in section 1238 of the Code of Civil Procedure.

ID.—STATUTE EXPRESSLY CONFERRING POWER ON CORPORATIONS ACTING AS COMMON CARRIERS.—Section 407 of the Civil Code, by expressly authorizing foreign corporations doing business as common carriers, to exercise the right of eminent domain, does not, by implication,

and through the operation of the maxim *expressio unius est exclusio alterius*, take away such right from all other foreign corporations.

ID.—CONSTRUCTION OF SECTION 407 OF CIVIL CODE—EFFECT OF CODIFICATION.—Section 407 of the Civil Code is a mere revision and codification, made in 1905 (Stats. 1905, p. 631), of section 1 of the act of 1880 (Stats. 1880, p. 21), and prior to its codification it would have had no effect upon the construction of section 1001 of that code and section 1238 of the Code of Civil Procedure, which were enacted in 1872, and conferred the right of eminent domain on all corporations, foreign or domestic. The embodiment of the statute in the code cannot have a different effect upon its meaning than an amendment thereof would have had, and as it did not repeal or modify the pre-existing law before its codification, it would not have that effect afterward.

ID.—WATER LOST IN TRANSMISSION BY SEEPAGE AND EVAPORATION.—The plaintiff is not debarred from condemning the full quantity of water asked for because a part of it would be lost in transmission to the place of use by seepage and evaporation. Some loss in this way is inevitable and it must be considered a part of that which is necessary to be taken to supply the actual use proposed.

ID.—USE OF PART OF WATER FOR PRIVATE PURPOSES—FURTHER CONDEMNATION FOR PUBLIC USE.—The fact that a water company is devoting to a private use a portion of the water to which it had acquired a right, does not prohibit it from condemning an additional quantity for public use. The fact that the water privately used and that sought to be condemned would be mingled together in the same canals is immaterial. If, after taking it, the plaintiff should convert it from public to private use, such conversion could be prevented.

ID.—CONDEMNATION OF PARTICULAR RIPARIAN RIGHT—PERSONS CLAIMING ADVERSELY CANNOT INTERVENE.—In an action by a water company, brought for the single purpose of condemning for public use the interest of a particular defendant, as riparian owner of certain land, in a specified quantity of the water of a stream, third persons not interested in the land in subordination to or in common with the defendant, but claiming adversely a paramount right to divert from the stream, at a point above the defendants' land and below the plaintiff's place of diversion, the same quantity of water as that sought to be condemned, have no right to intervene under section 387 of the Code of Civil Procedure.

ID.—JOINDER OF ADVERSE CLAIMANTS NOT AUTHORIZED.—Such adverse claimants have no interest in or right to the property sought to be condemned, and their joinder as parties to the condemnation suit is neither contemplated nor authorized by sections 1244, 1246, and 1247 of the Code of Civil Procedure.

ID.—NATURE OF RIPARIAN RIGHT—ACTIONABLE INTERFERENCE WITH.—A riparian right is local in its nature, and is parcel of the land to

which it attaches. It enables the owner to enjoin an injurious interference with the stream, but it does so only when such interference affects the stream where it passes by his land. A use of the stream above, if it does not affect it where it passes his land, is no violation of his right.

ID.—PARTIES—ACTION DOES NOT AFFECT ALL RIGHTS IN PART OF STREAM.—An action to condemn a particular riparian right is not an action to condemn absolutely all rights in and to a part of the flow of the stream, and persons having no right or interest in such riparian right are not proper parties to the action.

APPEAL from a judgment of the Superior Court of Merced County. E. N. Rector, Judge.

The facts are stated in the opinion of the court.

Frank H. Short, F. G. Ostrander, and Edward F. Treadwell, for Appellant.

J. C. Campbell, for James J. Stevinson, Respondent.

H. A. V. Torchiana, and W. B. Bunker, for W. D. and J. R. Adams, Respondents.

James F. Peck, for East Side Canal and Irrigation Company, Respondent.

SHAW, J.—This is an action to condemn property for public use. The plaintiff has been diverting water from the San Joaquin River and carrying it to lands in the San Joaquin Valley to be used for irrigation. It desires to divert an additional flow of five hundred cubic feet per second from the river into its canals for the same public use. This suit is begun to condemn the interest of the defendants in this additional quantity of water. At the close of the plaintiff's case the defendant moved for a nonsuit and the same was granted by the court. Judgment was rendered thereon and from this judgment plaintiff appeals.

1. The first ground of the motion for nonsuit was that the use to which the water proposed to be condemned and taken is to be devoted is not one of the public uses in behalf of which, under section 1238 of the Code of Civil Procedure, the right of eminent domain may be exercised.

It is conceded by plaintiff that the power of eminent domain is vested in the state, and that no person or corporation can avail himself or itself of that power, even in aid of a recognized public use, unless the state has granted to such person or corporation a right to exercise the power for the particular use proposed. There must be a statute conferring the power, either expressly or by necessary implication, and the proposed use must be one which comes within the terms of the grant. (*Southern Pacific R. Co. v. Southern C. R. Co.*, 111 Cal. 227, [43 Pac. 602]; *Moran v. Ross*, 79 Cal. 160, [21 Pac 547].) It is settled that the use of water for sale, rental, and distribution to the public generally is a public use. The only question for decision under this point is whether or not the statute confers the right of eminent domain upon a person who desires to condemn property to be devoted to such use.

The complaint alleges and the proof shows that the plaintiff owns two large canals leading out of the San Joaquin River into the country lying west of the river and extending from the county of Fresno through the county of Merced into the county of Stanislaus. One of these canals is seventy-two miles long and the other fifty-two miles long. It also has distributing canals leading therefrom to the lands in the vicinity, for convenience of distribution, and it maintains a dam in the river to divert the water therefrom into the canals. By this means it has been diverting water from the river and carrying the same into canals and selling it for irrigation, watering of stock and domestic uses "to the inhabitants of the counties of Fresno, Merced and Stanislaus," as it alleges. It also appears that it desires to divert from said river into said canals an additional flow of five hundred cubic feet per second and to carry the same in said canals and devote it to the same public use in the same manner, and that along its canals there is sufficient land upon which irrigation is necessary, the owners of which desire to use said water, to consume said additional quantity. The point where the canals begin and their present terminus are described with substantial accuracy. The canals are themselves permanent landmarks and, consequently, the termini being described, the situation and location of the canals, the place of use of the water to be con-

demned and the territory to be served therewith, are all thereby for all practical purposes properly pleaded.

We think this sufficiently shows that the plaintiff desires to take the water-rights sought to be condemned in behalf of the public use indicated by subdivision 4 of section 1238 of the Code of Civil Procedure by the words "supplying mines and farming in neighborhoods with water." While there is a general allegation in the complaint that the water is to be "sold to the inhabitants" of the three counties named, the specific facts alleged as to the method by which the water has been diverted, carried, and distributed and by which it is proposed to take, carry, and distribute the additional water, the place of use designated in the complaint and shown by the evidence and the purposes to which it is to be applied, show with reasonable certainty that the water is, in point of fact, to be supplied to farming neighborhoods, or "to farming in neighborhoods," as the last amendment to the section expresses the idea. The fact that there may be several separate farming neighborhoods along the very extensive canals of the plaintiff does not destroy its right. That a person engaged in supplying several such neighborhoods should have the right of eminent domain to obtain property therefor was evidently the object contemplated by the last amendment inserting the word "in" in the phrase "farming in neighborhoods." It may be that without this word the right to condemn for more than one neighborhood would have existed, but the insertion of this word implies that the main idea was the supplying of farming operations with water and that more than one neighborhood might receive water from the same system of works.

The law does not require, in order to maintain an action to condemn water for public use, that the boundaries of the territory to which it is to be dedicated shall be alleged and proven with absolute certainty. The nature of the use is such that this could not be done. A railroad, a highway, or a public building, has a fixed location to which all who desire to use them must come. It is not so with water devoted to public use. In that case the public service consists in conducting the water to the consumers, or to some convenient place where they can obtain it. Main canals are built from the source of supply to and through the territory to be supplied and both the landowners whose lands abut thereon and those who can

run a private ditch thereto are allowed to have the water at the fixed rates. The territory is also usually enlarged by means of lateral distributing canals, which are also available for use in the same way. Not every landowner who could do so may apply for the water. Those who take it one year may not do so the next and their portions may be furnished to others. It is also the fact that after the lower levels are saturated by a few years continuous irrigation such land will require much less water than before and the same quantity of water may then be distributed over a much larger territory. For these reasons it is impossible to say, in advance, or at any particular time, precisely what will be the boundaries of the territory served or to be served with the water. The interests and protection of the persons whose water-rights are to be condemned for public use, do not make it necessary to give such precise description. The location of the proposed canal being shown, the *situs* of the proposed use is thereby fixed with sufficient accuracy.

It is perhaps unnecessary to add that a right to divert water to be allowed unnecessarily to run to waste, cannot be acquired, even by a judgment of condemnation. Such judgment, when given, would afford no protection for such a taking.

We think also that the use described in the complaint is one for which the right of eminent domain is given in subdivision 3 of said section, as "canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes for conducting or storing water for the use of the inhabitants of any county, . . . and all other public uses for the benefit of any county, . . . or the inhabitants thereof, which may be authorized by the legislature."

This language necessarily implies, not only that property may be condemned for the canals and conduits mentioned, but that water may also be taken to be carried in the canals and ditches. This precise question was decided in *Northern etc Co. v. Stacher*, 13 Cal. App. 409, [109 Pac. 896], by the third district court of appeal. The question is elaborately and ably discussed and the decision received the approval of this court, as is evidenced by the fact that it denied an application for a rehearing thereof. It follows from this decision that water may be condemned and taken for public use by any person

or corporation proposing to apply it "to the use of the inhabitants of any county."

The defendants claim that this subdivision does not confer the right of eminent domain for the use mentioned unless the person in charge of the use proposes to supply all of the inhabitants of the county, and that if the taking is for the use of a particular district or territory of the county only, it is not authorized under this subdivision. There can be no doubt that the furnishing of water generally to the inhabitants of a particular section of the county is a public use. It is not even necessary, in order to constitute a public use, that the water should be obtainable by all the inhabitants of the immediate territory to which it is taken. It may be a public use, although all persons within that territory cannot enjoy it. It is sufficient if all who are capable of enjoying it have an equal right to it. For example, it has been held that water devoted to the use of all the landowners within a specified territory, on equal terms to all, and open to all, for the irrigation of their lands, is devoted to a public use. (*Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 161, [41 L. Ed. 369, 17 Sup. Ct. Rep. 56]; *Merrill v. Southside I. Co.*, 112 Cal. 426, [44 Pac. 720].)

Where a statute "is fairly susceptible of two constructions one leading inevitably to mischief or absurdity, and the other consisting of sound sense and wise policy, the former should be rejected and the latter adopted." (*In re Mitchell*, 120 Cal. 386, [52 Pac. 800].) "A construction should not be given to a statute, if it can be avoided, which will lead to absurd results, or to a conclusion plainly not contemplated by the legislature." (*Merced Bank v. Casaccia*, 103 Cal. 645, [37 Pac. 649].) The section is also subject to the rule that its provisions are to be liberally construed, with a view to effecting its objects and to promote justice. (Code Civ. Proc., sec. 4.)

It is a fact, of which the court may well take judicial notice, that there is no county in the state in which it is practicable to serve all of its inhabitants with water by means of one system of works. The topography will not permit it. The city and county of San Francisco, if it should be classed as a county, is perhaps an exception. But it is classed separately in the subdivision referred to. If this part of the statute is to be given the effect here claimed the result is that it will

be wholly ineffectual. In the entire history of the state, it is safe to say, no person or corporation has ever seriously and in good faith proposed to supply all of the inhabitants of any county with water through one system of works or from one source. No such proposition ever will or can be honestly made. The result of this interpretation therefore will render the statute wholly ineffectual as well as absurd. In considering a statute it is necessary to assume that the legislature intended it to have some effect. There must have been some purpose in view which led to its enactment. The obvious purpose of this section as a whole was to confer the right of eminent domain upon persons engaging in public service for the various purposes described. This particular clause was intended to encourage and assist those proposing to establish systems of waterworks for the supplying of the public. It was to facilitate the transportation of water from a source where it was comparatively useless to places where it would be useful and would promote the general welfare and prosperity and of furnishing it at such places to those in need of it. In order to further this object the statute should have such interpretation as will make it effectual for that purpose if it is reasonably possible to do so. It will be noted, therefore, that the clause does not use the word "all" in connection with the word "inhabitants." The phrase is "for the use of the inhabitants of any county." According to a well recognized usage this description would be filled by one who supplied water for the use of the inhabitants of a considerable part of the county although he did not or could not supply it to all the inhabitants thereof. The language may be as well applied if the word "inhabitants" is taken as descriptive of the character or *status* of the beneficiaries as it would be if the word is taken as designating the number to whom it is to be supplied or the area to which the use must extend. But a more obvious purpose in the use of the phrase is seen when the clause is taken in connection with the preceding clause of the subdivision. The two clauses together read as follows: "Public buildings and grounds for the use of any county, incorporated city, or city and county, village, town or school district; ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches or pipes for conducting or storing water for the use of the inhabitants of any county, incorporated city, or

city and county, village or town." The uses mentioned in the clause preceding the semicolon are those for organized public corporations and are for purely public purposes; those in the second clause are for the individual members of the community for their individual private use and for the benefit of their persons or their property. It was to distinguish private individuals from public corporations that the word "inhabitants" was used in the second clause, and not for the purpose of expressing the idea that the takings mentioned in the second clause were to be limited to cases where all the inhabitants were to be the beneficiaries. It was intended to distinguish between a taking for the organized public and a taking for persons as members thereof. In view of these considerations we think it should be held to be a sufficient compliance with the terms of this subdivision if the proposed use of water is for a part of the inhabitants of a county comprising a sufficiently large proportion of the inhabitants capable of using it in the particular territory "as to destroy its character as a private use," as was said in *Lindsay v. Mehrrens*, 97 Cal. 678, [32 Pac. 802]. The proof shows that the plaintiff proposes to distribute the water generally to the inhabitants of a very large area of the three counties mentioned, chiefly for the irrigation of their lands and also for domestic uses and for the watering of stock and incidentally to some towns and villages which have grown up along the routes of its canals. It is one of the largest irrigation enterprises in the state and serves water to over one hundred and fifty thousand acres of land. We think the use it proposes to make of this water is one for which it is authorized to exercise the right of eminent domain under section 1238.

It is further suggested in this connection that the nonsuit was properly granted because there is a fatal variance between the allegations as to the extent of the use proposed and the proof thereof, in this: That the allegation is that the water is to be devoted to sale and distribution to the inhabitants of Fresno, Merced, and Stanislaus counties, whereas the proof shows that it can be sold and distributed only to inhabitants along the lines of its canals and wholly in the territory west of the river. While there is a general allegation to this effect, as before stated, the specific facts alleged show clearly

enough that the water is to be taken only to the lands on the west side. There is no substantial variance.

2. The plaintiff is a Nevada corporation. The defendants contend that its articles of incorporation do not designate the application of water to public use as one of its corporate powers, and further, that a foreign corporation cannot, under the laws of this state, exercise the power of eminent domain. For these reasons they contend that the nonsuit was properly granted.

The articles state that the plaintiff corporation is formed and empowered to construct canals in California leading from the San Joaquin River, for the carriage of passengers and freight, and for the purpose of irrigation, and to supply water to the inhabitants of cities and towns in California. These powers are sufficient to authorize it to carry water in its canals to be devoted to public use for the purposes of irrigation, navigation, and commerce.

The words "any person," in section 1001 of the Civil Code, includes any public or private corporation, as well as any natural person, and by the terms of the section, any such person may, "without further legislative action" acquire property by condemnation for any public use specified in section 1238 of the Code of Civil Procedure, and in doing so becomes "an agent of the state" and a "person in charge of the use" for that purpose (*Pasadena v. Stimson*, 91 Cal. 248, [27 Pac. 604]). The state may authorize foreign corporations to exercise this right. (*Gilmer v. Lime Point*, 18 Cal. 255.) Foreign corporations have always been allowed to enter this state and do any business therein that is within their corporate powers. Their right to do so has been recognized and sanctioned by our statutes ever since April 4, 1870 (Stats. 1869-70, p. 881). For all purposes of every business within their capacity they are classed with domestic corporations, provided they comply with the statutes allowing them to do business here, and a statute which by necessary construction confers powers upon corporations in general, is to be understood to confer that power upon foreign corporations doing business here as well as domestic corporations. The aforesaid section would, therefore, appear to give them the right of eminent domain on the same terms as other persons and corporations. There would be no doubt of this proposition were it not for section 407

of the Civil Code, expressly authorizing foreign corporations doing business as common carriers to exercise the right of eminent domain. The defendants claim that by the operation of the maxim *expressio unius est exclusio alterius*, this section, by implication, takes away such a right from all other foreign corporations. The part of the section relating to this subject is as follows: "Every railway or other corporation organized for the purpose of carrying freight or passengers under or by virtue of the laws of the United States, or of any state or territory thereof, may build railroads, exercise the right of eminent domain, and transact any other business which it might do if it were created and organized under or by virtue of the laws of this state, and has the same rights, privileges, and immunities, and is subject to the same laws, penalties, obligations, and burdens as if created or organized under and by virtue of the laws of this state." The effect of this provision was considered by the district court of appeal for the third district in *Western Union Tel. Co. v. Superior Court*, 15 Cal. App. 679, [115 Pac. 1091, 1100], an application for a writ of review. That court reached the conclusion that the right to exercise the power of eminent domain was not thereby withheld from foreign corporations which were not common carriers. Upon petition for rehearing, this court declined to express any opinion on that question, saying that it did not affect the jurisdiction of the superior court, and that, therefore, it could not be material in *certiorari*. Upon considering the question more fully, we agree with the district court that section 407 was not intended to prevent other corporations than those described therein from exercising the right of eminent domain.

The section is a mere revision and codification of section 1 of the act of 1880 (Stats. 1880, p. 21). The codification was made in 1905 (Stats. 1905, p. 631). Some verbal changes are made, but it is essentially the same, and the particular provision in question is not altered at all. Section 1001 of the Civil Code and section 1238 of the Code of Civil Procedure were enacted in 1872. Their effect, as we have seen, was to confer this right upon all corporations, foreign or domestic, public or private, for the particular uses designated in section 1238. The act of 1880 did not purport to take away any right of this character. It was an entirely independent enact-

ment and it is clear that prior to its codification it would have no effect whatever upon the construction of sections 1001 and 1238 aforesaid. The maxim *expressio unius*, etc., is not of universal application. "What is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provision in the particular act. The maxim is applicable to a statutory provision which grants originally a power or right. In such cases the power or right originates with the statute and exists only to the extent plainly granted." (2 Lewis Sutherland's Statutory Construction, sec. 491.) If this statute had been the only one on the subject there would be good reason for saying that no other corporations would have the power, for the power would remain in the state except as granted by statute. But as the power had been given to all other corporations by statutes of which this was not an amendment, the reason for the application of the maxim is altogether wanting.

Furthermore, the incorporation of the statute in the code cannot be said to have a greater effect upon its meaning than an amendment thereof would have had. Where a statute is amended, the parts which are not altered are to be considered as having been the law from the time when they were enacted (Pol. Code, sec. 325). Hence, the meaning and effect of the statute of 1880 would not be changed by putting it in the code, and if it did not repeal or modify the pre-existing law before its codification, it would not have that effect afterward.

3. The objection that the proof showed that the water was not necessary to public use, except for a portion of the year, if it ever was of any force, was removed by the filing of an amended complaint wherein the taking of the water is limited to the season when it is actually required, the dates being specifically stated.

4. There is no merit in the proposition that the plaintiff cannot condemn the full quantity asked for because a part of it would be lost in transmission to the place of use by seepage and evaporation. Some loss in this way is inevitable and it must be considered a part of that which is necessary to be taken to supply the actual use proposed. There was evidence to the effect that there would be no loss of this character which could be prevented by reasonable care or precaution.

5. One ground of the motion was that it appeared that the plaintiff's intention was to devote the water to be condemned, or a part of it, to private use. There seems to be no real foundation for this claim. Prior to the beginning of this action the plaintiff was, and for many years had been, diverting from the river a flow of seven hundred and sixty cubic feet per second into its canals and selling the same for irrigation and other purposes. To this quantity it had acquired a right. A part of it was delivered to Miller & Lux annually for a fixed price under a contract made in 1871 with its predecessor in interest, whereby said predecessor was paid some thirty thousand dollars for the building of the canals and acquired from Miller & Lux rights of way therefor. There were subsequent changes therein, not important to the question. The plaintiff and its said predecessor had also been taking for several years the five hundred cubic feet per second the right to which is here sought to be condemned and had been devoting the same to public use, but neither of them had acquired any right to do so as against the defendants. This suit was begun to obtain that right. Conceding but not deciding that the water delivered to Miller & Lux, under the contract of 1871, was taken for private use, it does not follow that the five hundred cubic feet here in controversy is to be taken for that purpose. The contrary is asserted by the plaintiff and there is nothing to show that it is not stated in good faith. The plaintiff is already bound by the contract of 1871 to furnish the Miller & Lux water and it has done so out of the seven hundred and sixty cubic feet to which it had a right. The present proposed taking is an altogether distinct appropriation of an additional quantity. This claim seems to be partly founded on the fact that the water is to be mingled together in the canals. This fact seems to be immaterial. It does not affect the public use of the five hundred cubic feet. If, after taking it, the plaintiff should convert it from public to private use such conversion could be prevented. But as there is no evidence of such intent and it cannot be anticipated in this way, the mere assertion that plaintiff may in the future wrongfully do so cannot defeat its right to the condemnation.

6. We think the lower court erred in permitting J. R. Adams, W. D. Adams, and the East Side Canal and Irrigation

Company to become defendants to the action and to file answers to the complaint, and in refusing to strike out such answers on motion of the plaintiff. Perhaps such an error would not, in every case, be sufficient to require a reversal of the judgment. It might be that no substantial injury would ensue therefrom. We need not say whether it would be sufficient in this case or not, since the judgment must be reversed for other reasons. The complaint alleged that the property sought to be condemned was the interest of the Stevinson Company, as riparian owner of certain lands, in the five hundred cubic feet of water which plaintiff proposed to take for public use. The other original defendants had or claimed some lien upon the land of the Stevinson Company and claimed under that company. The above named intervening defendants did not claim under the Stevinson Company. They each claimed adversely to it. Their claim was that they had, apparently by continuous adverse use, acquired from the Stevinson Company the right to divert from the river, at a point below plaintiff's dam and above the Stevinson land, the identical five hundred cubic feet of water which plaintiff proposed to take and for which it proposed to condemn the Stevinson right. Calling it the same does not make it so, nor does the fact, if it be a fact, that the water is the same, that is to say, that if plaintiff did not take it, the same would be diverted by said interveners and would not reach the Stevinson land, make it the same right. The condemnation of this water-right of Stevinson for the protection of plaintiff's diversion, would not give plaintiff any right whatever against any other person and it would not at all affect the rights of the interveners. The plaintiffs taking had been interfered with by the Stevinson Company, or its predecessor in ownership of the land. Plaintiff desired to prevent such interference in the future by condemning the right in virtue of which the interference was made. The interveners had no interest in the Stevinson land, or in the riparian rights pertaining thereto, which, alone, the plaintiff sought to condemn. It was this riparian right which was the subject matter of the litigation. The action was not a suit in equity to determine the title to the water, generally, or one in which a general adjudication of such title could be made. It was a special proceeding for a particular purpose—

namely, to condemn the Stevinson right for the benefit of the plaintiff as the purveyor of the public use. In such a controversy, third persons not interested in the land in subordination to or in common with the person whose right was sought to be taken, but claiming adversely, have no right to intervene under section 387 of the Code of Civil Procedure.

We have considered all the grounds stated in the motion for a nonsuit. As none of them is sustained, it follows that the court erred in giving judgment for the defendants.

The judgment is reversed.

Henshaw, J., Melvin, J., Lorigan, J., and Angellotti, J., concurred.

SLOSS, J. dissenting.—I dissent. In my opinion the nonsuit was properly granted on the first ground stated in the motion, viz., that the purpose for which condemnation is sought is not one of the public uses in behalf of which, under section 1238 of the Code of Civil Procedure, the right of eminent domain may be exercised.

The majority of the court has reached the conclusion that the plaintiff's claim may be sustained under either subdivision 3 or subdivision 4 of section 1238. With respect to subdivision 4 ("the supplying of mines and farming [in] neighborhoods with water") it may be said that the plaintiff itself makes no contention that its complaint stated or that its proof established a right under this subdivision. The complaint plainly shows that it was framed with the intent of making a case under subdivision 3, and the briefs of the appellant virtually concede that a claim of right to condemn under subdivision 4 was not presented and is not involved. Under these circumstances, this point may be passed with the statement that I believe the concession to have been no more than was required by the state of the record.

The question, then, is whether the proof supported the allegations of the complaint that plaintiff intends to devote the water in question to the purposes of sale, rental, and distribution to the inhabitants of the counties of Fresno, Merced, and Stanislaus. It appears that plaintiff has been furnishing water and intends to continue to furnish it to a large part of the territory and a considerable number of the inhabitants on

the west side of the San Joaquin River. There is no pretense that it has brought the water, or intends, or is able to do so, within the reach of the extensive territory and large population on the other side of the river, within the counties named. Without going any further into particulars, it may be said that the territory which plaintiff is able to furnish with water constitutes far less than one-half of the area of each county named, indeed, far less than one-half of the irrigable lands of any of said counties. On this state of facts, I think that the district court of appeal for the third appellate district, in which this appeal was originally pending, was right in expressing the view that in order to make out a case under subdivision 3 of section 1238, "the canals and other contrivances used by plaintiff should be so located and constructed and its business so conducted as to make the water available generally to the inhabitants of these counties for the purposes stated."

The language of the statutory provision under consideration is this: "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: . . . 3. . . . ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes for conducting or storing water for the use of the inhabitants of any county, incorporated city, or city and county, village or town . . ."

The contention of the appellant, sustained by the majority opinion, is, in effect, that a public service corporation engaged in the sale, rental, and distribution of water within one or more counties, which is ready to furnish, and has canals and works sufficient to furnish such water to so great a number of the inhabitants of such county or counties as to make the character of the use public rather than private, is engaged in the sale, rental, and distribution of water "for the use of the inhabitants of any county." In other words, the statute, thus construed, authorizes the condemnation of property in behalf of ponds, lakes, canals, etc., for constructing or storing water for the use of any number of people residing upon any number of parcels of land anywhere within the state, provided only that the use be of a public character. For, since the entire area of the state is divided into counties, it is apparent that canals or other conduits devoted to supplying water to any of the inhabitants of the state are used for the

inhabitants of one or more counties. This construction seems to me to make meaningless most of the language in the part of the subdivision under consideration. If all that was intended to be required was that the use should be public, there would have been no need of inserting the words "incorporated city, or city and county, village or town," or, indeed, the word "county." This is, of course, contrary to the well settled rule requiring a court in construing a statute to give meaning and effect to every word contained in it, if reasonably possible.

Section 1238 does not provide that the right of eminent domain may be exercised in behalf of *every* public use. What it does is to enumerate certain public uses, and to declare that the power of eminent domain may be exercised in behalf of the particular uses enumerated. That the corporation plaintiff is in the control of a public service is not conclusive upon the question of its right to exercise the power of eminent domain. It must appear in addition that the statute has authorized the exercise of this power for the particular purpose for which it is sought to be exercised.

It must be assumed that the legislature had some purpose in limiting the right of eminent domain to the public use of conducting or storing water "*for the use of the inhabitants of any county, incorporated city, or city and county, village or town.*" The idea in the minds of the lawmakers evidently was that the right of eminent domain in aid of the furnishing of water was not to be granted in every case of a public use, but only where the water was for the use of the inhabitants of the governmental subdivisions enumerated. It is of the essence of a public service that the service shall be compellable (to the extent of its capacity and subject to reasonable restrictions) by all the members of the community to whose use the subject of the service is appropriated. (Wyman on Public Service Corporation, sections 273, 344; *Lux v. Haggin*, 69 Cal. 269, 306, [4 Pac. 919, 10 Pac. 674].) When, then, the statute speaks of furnishing water to the inhabitants of a county, city, city and county, village or town, it contemplates a service available to the inhabitants, generally, of the respective governmental territories, not a service to such part of the territory as may be selected by a water company. The inducing cause for granting the right was the benefit of the

public to be served, rather than the advantage of the individual or corporation seeking to supply water. The existence of the right, by the language of the statute, was made to depend upon the extent of the public to be so served. This mode of measurement is totally destroyed and much of the language of the subdivision deprived of any meaning, by holding that the statute authorizes the exercise of eminent domain in behalf of canals, etc., for supplying water to the inhabitants of any part, so extensive as to escape the objection that the use is private, of a county, a city, a village, or a town. Let us test the question by supposing a complaint in which the plaintiff alleges that it is engaged in furnishing water to the inhabitants of a supervisorial district and that it desires to condemn certain private water-rights in order to supply such use. Assuming the service to be such as to constitute the use a public one, could it be contended that, because the inhabitants of the district are inhabitants of a county, the right of eminent domain is conferred by the statute under consideration? It seems to me that the question carries its own answer and that answer is one that requires the affirmance of the order appealed from.

On all other matters discussed in the main opinion I agree with the views therein expressed.

Rehearing denied.

In denying a rehearing, the court in Bank rendered the following opinion on December 20, 1912:

SHAW, J.—In a petition for rehearing, the respondents claim that the part of the opinion of the court herein relating to the admission of the East Side Canal and Irrigation Company and others as defendants, being the part numbered 6, is contrary to the provisions of sections 1244, 1246, and 1247 of the Code of Civil Procedure. We deem it advisable to restate the position of the court more at length.

Section 1244 requires the complaint in a condemnation suit to state "the names of all owners and claimants of the property," as defendants. Section 1246 provides in substance that any person occupying, or having or claiming any interest in the property sought to be condemned, may appear, plead and defend as to his interest. Section 1247 provides that in such

actions the court shall have power to hear and determine all adverse or conflicting claims to the property sought to be condemned.

It is obvious from this language that these provisions do not contemplate or authorize the admission of a person as a party who does not show that he has some interest in or right to the property sought to be condemned, or of a person whose statement of his right shows that he has no such interest.

All that these parties had, or claimed to have, was the right to divert from the stream of the San Joaquin River, at a point about thirty miles below plaintiff's dam and twenty miles above the Stevinson land, a flow of water equal to five hundred cubic feet per second. They claim that this right was paramount and superior to the riparian rights of the Stevinson land in the river passing that land. If this is true, then it follows, necessarily, that the right or interest of those parties constituted no part of the riparian rights of the Stevinson land in the river. Their diversion took it out of the river above, it was consumed by use in irrigation, it never again reached the river and it formed no part of the river passing the Stevinson land, to which the riparian rights attached.

The riparian right is parcel of the land to which it attaches. It is local in its nature. It enables the owner to enjoin an injurious interference with the stream, but it does so only when such interference affects the river where it passes by his land. If he cannot show this, he cannot complain of the interference. A use of the stream above, if it does not affect it where it passes his land, is no violation of his right. The intervening defendants having, as they say, a paramount right to take out the water above, such water ceases to be a part of the river which rightfully reaches the Stevinson land and its riparian rights do not extend to or include it. To say that the riparian right of the Stevinson land does include it, would be to admit that the right claimed is not paramount to the riparian right. The right of these defendants is, therefore, a right of property entirely separate, distinct from and unconnected with the riparian rights of the Stevinson Company in the river, which latter constitutes the property sought to be condemned.

The argument of these parties is based upon the idea that the plaintiff is seeking to condemn absolutely all rights to a

part of the flow of the river equal to five hundred cubic feet per second. Hence they claim that every person having or claiming any interest in the stream is interested in the property sought to be condemned and may become a party defendant. Every other appropriator of water from the river and every owner of land riparian thereto from Firebaugh to Antioch, a distance of something over one hundred miles, could, upon this theory, insist upon becoming a party to the action. We need not determine whether this would be so or not, for this is not such a case. The property sought to be condemned is not the general or particular right of any and every person to five hundred cubic feet per second of the water of the San Joaquin River at plaintiff's dam, but is merely the riparian right attaching to the Stevinson land, so far as it may affect, or be affected by, the proposed diversion of that quantity by the plaintiff. The suit affects nobody and interests nobody except persons having some right or interest in the Stevinson land. The facts stated by these parties show that they have no such right or interest. Hence they were not proper parties to the action.

The petition for rehearing is denied.

Angellotti, J., Lorigan, J., Henshaw, J., and Melvin, J., concurred.

[L. A. No. 2989. Department One.—November 27, 1912.]

J. B. T. LEAVENS, Respondent, v. PINKHAM & McKEVITT (a Corporation), Appellant; B. MAES, Cross-defendant and Respondent.

APPEAL—DENIAL OF NONSUIT—REFUSAL TO STRIKE OUT TESTIMONY—NONAPPEALABLE ORDER.—No appeal lies from an order denying a motion for a nonsuit or from rulings made during the course of the trial refusing to strike out testimony. The action of the court in such matters may be reviewed on an appeal from the judgment, if properly presented by the record.

SALE—PURCHASE BY AGENT HAVING OSTENSIBLE AUTHORITY—EVIDENCE. In an action to recover the purchase price of fruit alleged to have been bought by the defendant acting through its agent, and which

the defendant claimed to have received merely on consignment to be sold for the benefit of the consignors, the evidence is held sufficient to support the finding of the jury of an actual sale to the defendant, and that the defendant, by want of ordinary care, had allowed its agent to appear to the sellers as having the authority to enter into the contracts of sale on its behalf.

ID.—AUTHORITY OF GENERAL MANAGER OF BUSINESS—BUYING OF FRUIT.

Where an agent is by his principal put in charge of a business in a certain locality as the manager thereof, he is clothed with apparent authority to do all things that are essential to the ordinary conduct of the business at that place. If the business consists in large part of the buying of fruit, he is apparently clothed with authority to buy for his principal. Such acts are within the apparent scope of his employment, and third persons acting in good faith and without notice of or reasons to suspect any limitations on his authority, are entitled to rely on such appearances.

ID.—ACTUAL AUTHORITY TO BUY—SECRET LIMITATION AS TO PRICE—

BONA FIDE SELLER.—Where a general agent has actual authority to buy, a secret limitation as to the price he is authorized to pay is not binding on a third person who has acted in good faith, relying upon his apparent general authority, provided he has exercised reasonable prudence, and the terms and price fixed are not so unusual or unreasonable as to fairly put a prudent man on his guard.

ID.—STATUTE OF FRAUDS—ACCEPTANCE BY AGENT.—The acceptance of goods purchased under a verbal contract of sale, by an agent having authority to make the purchase, is a sufficient acceptance by the principal to obviate any objection based on the statute of frauds.

APPEAL from a judgment of the Superior Court of San Bernardino County. Benjamin F. Bledsoe, Judge.

The facts are stated in the opinion of the court.

Kuster, Loeb & Loeb, and Edward G. Kuster, for Appellant.

F. B. Daley, for Respondent.

ANGELLOTTI, J.—This action was brought to recover money claimed to be due plaintiff upon: 1. An alleged contract of sale by plaintiff to defendant of a crop of oranges belonging to plaintiff; 2. A similar alleged contract between one B. Maes and defendant for Maes's oranges; and 3. Similar alleged contracts between plaintiff's father, J. M. Leavens, and defendant, with respect to oranges, lemons, and grape fruit, the claims of Maes and J. M. Leavens having been

assigned to plaintiff. Defendant denied that it ever entered into any of the alleged contracts, claiming that it received all fruit asserted to have been delivered under the same, on consignment to be packed, shipped, marketed, and sold for the benefit of the consignors, and the net proceeds thereof only to be paid to plaintiff and his assignors. These net proceeds did not exceed \$775, for which sums defendant offered to allow plaintiff to take judgment. The case was tried with a jury, which, in addition to answering certain special issues submitted, found a general verdict in favor of plaintiff for \$1,072.22 on plaintiff's own contract, for \$1,039.36 on the Maes contract, and for \$16.26 on the J. M. Leavens contract, an aggregate of \$2,127.84. Judgment was entered in favor of plaintiff on such verdict. This is an appeal by defendant from such judgment. There are also attempted appeals from an order denying defendant's motion for a nonsuit, and two rulings made in the course of the trial refusing to strike out certain testimony, but none of these orders or rulings was an appealable order. If the trial court erred in any of these matters, its action may be reviewed on the appeal from the judgment, if properly presented by the record.

The only point made by the briefs on this appeal is as to the sufficiency of the evidence to sustain the verdict of the jury, and it is only in one respect, a matter essential to any recovery on the theory of a sale, that this claim is made. It is not questioned that the evidence is sufficient to sustain the conclusion that one H. G. Hand, an agent of defendant for certain purposes at least, entered into the alleged contracts with plaintiff and his assignors, purporting to do so on behalf of defendant corporation, that he received the oranges, lemons, and grape fruit for which compensation is here sought, under said contracts, and that the amount awarded plaintiff by the verdict is correct if such contracts are legally binding on defendant. It may be conceded, too, that the evidence shows without conflict that Hand did not have actual authority from defendant to purchase any of the oranges or lemons, and that his authority to purchase grape fruit limited him to a price not exceeding three dollars per hundred pounds, while by his contract with J. M. Leavens he agreed to pay \$3.50 per hundred pounds. Plaintiff's theory is that Hand had the ostensible authority to make these contracts of purchase on behalf

of defendant, the authority defined by section 2317 of the Civil Code as being "such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess," and that defendant is therefore bound by such contracts. Section 2334 of the Civil Code provides that "a principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof," and it is claimed that the evidence was such as to sustain a conclusion that plaintiff and each of his assignors entered into said contracts with Hand, as the agent of defendant, and delivered their property to him as such agent thereunder, in good faith and without want of ordinary care. The answers of the jury to special issues submitted to them on this branch of the case were all in favor of plaintiff's theory, being substantially that either intentionally or by want of ordinary care an appearance was allowed by defendant to exist and be known to plaintiff and each of his assignors that Hand was authorized to enter into and execute such contracts, and that each of them in dealing with Hand as defendant's agent acted in good faith and without want of ordinary care.

It would serve no useful purpose to discuss in this opinion at great length the evidence given on the trial. Bearing in mind the well settled rules that all conflicts in the evidence were for the jury to determine, and that the verdict must be sustained by an appellate court if there is sufficient evidence, considered in connection with such inferences as may reasonably be drawn therefrom, to sustain it, regardless of the evidence tending to a contrary conclusion, we shall briefly state such of the evidence as, in our judgment, sufficiently supports the verdict.

Defendant corporation, with its principal place of business in southern California at Los Angeles, has for several years operated packing houses in various portions of the state, at which it received citrus fruits for packing and shipping to market. The evidence warrants the conclusion that while very frequently it did this as agent of the persons from whom it received the fruit, accounting to them only for the net proceeds, it also very frequently bought the fruit outright from the growers. One of its packing houses was at Patton, near

the city of San Bernardino, in and about which plaintiff and his assignors resided. In the spring of 1908 Hand was installed as manager of this packing house, and continued in that capacity throughout the transactions involved in this action. He was the sole representative of defendant in that locality, and although Mr. Pinkham, the president of defendant corporation, at times visited Patton and in company with him inspected growing crops in that vicinity, he personally transacted all the business done by defendant at that place. He had an automobile, on which was printed in large letters "H. G. Hand, Manager for Pinkham & McKevitt," and the evidence was sufficient to warrant the conclusion that Mr. Pinkham, who rode with Hand therein, had full knowledge of this. He had in his possession printed forms of contract for the purchase by defendant of citrus fruits, defendant's name being printed thereon, which forms were furnished him by defendant, and which he used in making his contracts of purchase. During the spring of the year 1908 Hand purchased oranges for and in the name of defendant from plaintiff and from each of his two assignors, Maes and J. M. Leavens, and his contracts in this behalf were recognized as binding by defendant and the vendors were subsequently paid therefor with checks signed by defendant. During the same time, he purchased in the same way for defendant the oranges of numerous other growers in that vicinity. In fact, the great bulk of the very considerable business done by him for defendant in that locality consisted of the absolute purchase of the fruit, as distinguished from the taking of it on consignment for sale. No question was ever raised by defendant as to his authority to buy as he did during that season. In fact, it is admitted that he did not exceed the authority given him in a single case during the season, and that he had been expressly directed to buy oranges to the extent to which he did purchase and authorized to pay the prices he had agreed to pay. By such directions he was expressly authorized to purchase from such persons as he saw fit to purchase from, being limited only as to the amount and price. Two or three of the persons with whom he contracted communicated with defendant at its office in Los Angeles as to his authority to make the contracts proposed, and the testimony as to the response given was such as to warrant a conclusion on the part of the inquirer that what-

ever Hand assumed to do was all right. Everybody who sold to him received without question from defendant the full amount of the agreed price, and there is no pretense that any one was ever expressly advised by any act or word of defendant that there was any limitation on the power of Hand to bind defendant by such contracts of purchase as he saw fit to make. During the spring of 1909 he made many similar purchases as agent for and in the name of defendant, including those here involved. According to the brief of counsel for defendant, upwards of twenty thousand dollars of these were unauthorized, and Hand did not report the same to defendant, but designated the fruit so obtained in his "manifests or car reports" as "consigned fruit," that is, fruit which was being handled for the account of the grower. Included among these unauthorized purchases were those here involved, with the single exception of the grape fruit purchased from J. M. Leavens. Hand was authorized to purchase that, but his secret instructions limited him to three cents a pound, while he agreed to pay three and a half cents a pound. When the market weakened and prices dropped during that season, defendant found itself confronted with the claims of those who had entered into such contracts of sale with Hand, and after investigation paid most of them in full, paid some with a slight discount, and rejected only the claims in controversy in this action.

We are of the opinion that there can be no question that the situation disclosed by the evidence we have stated was such as to reasonably support a conclusion that defendant by want of ordinary care allowed Hand to appear to the growers in and about Patton as having the authority to enter into, on its behalf, such contracts of purchase of fruits as he made. Defendant was engaged in the business in and about Patton not only of taking citrus fruits on consignment for the growers, but also in the business of buying outright such fruit. Hand was admittedly its agent and was apparently in charge of its business in that locality, acting as its sole representative in all that it did—its general manager at that place. He was apparently acting within the scope of a general employment to represent defendant in its business at that place, and such business included not only the taking of fruit on consignment, but also the purchase of fruit. Absolutely nothing was done

by defendant to indicate to those with whom he was known to be transacting business that there was any limitation whatever imposed on him. During the whole of the previous season his contracts of the character of those involved in this action were accepted without question by defendant as binding upon it. When inquiry was made as to his authority in two or three cases, the responses were such, construing the evidence in the light most favorable to defendant, as to indicate that whatever he did in such matters was acceptable to defendant. It will not be questioned, we assume, that where an agent is by his principal put in charge of a business in a certain locality as the manager thereof, he is clothed with apparent authority to do all things that are essential to the ordinary conduct of the business at that place. If the business consists in large part of the buying of fruit, as we must assume under the evidence it did in this case, he is apparently clothed with authority to buy for his principal. Such acts are within the apparent scope of his employment, and third persons acting in good faith and without notice of or reasons to suspect any limitation on his authority, are entitled to rely on such appearances. (See Clark & Skyles on Agency, secs. 200, 208, 261.)

That the evidence was such as to warrant the jury in concluding that this was the situation in so far as plaintiff and his assignor J. M. Leavens were concerned, we have no doubt. Each of them had sold fruit to Hand as the agent of the defendant during the previous season, and had received the purchase price from defendant. They also had knowledge of the other facts warranting a conclusion that he was invested with full authority in the matter of such purchases. Certain testimony of plaintiff himself given on cross-examination, which is relied on by appellant, is not of such a nature as to compel a conclusion that he had any intimation or suspicion that Hand was limited to such purchases as he was specially directed to make. Nor was there anything in the testimony given in regard to the conversation with Mr. Pinkham relative to Hand not having been authorized to purchase certain lemons, when such testimony is viewed in the light most favorable to respondent, which compels such a conclusion. We have considered all the points made by learned counsel for appellant in support of the claim that neither of the Leavens can be held to have acted in good faith and with ordinary care

in their dealing with Hand, and are satisfied that it must be held that the verdict of the jury on these matters has sufficient legal support in the evidence.

As to the grape fruit sold by J. M. Leavens to Hand for defendant, it will be remembered that Hand was authorized to buy, and that the only excess of authority was in agreeing to pay three and a half cents per pound, when he was limited by secret instructions to three cents per pound. It is well settled that such a limitation is not binding on a third person who has acted in good faith, relying upon an apparent general authority of the agent, provided he has exercised reasonable prudence, and the terms and price fixed were not so unusual or unreasonable as to fairly put a prudent man on his guard. (See Clark & Skyles on Agency, sec. 206c; Mechem on Agency, sec. 362.)

As to plaintiff's assignor Maes, the evidence in the record is not as clear and explicit as in regard to the Leavens on the question of knowledge of the matters held sufficient to show ostensible authority, and the exercise of ordinary care by the vendor in dealing with Hand as the fully authorized agent of defendant. There is undoubtedly enough in the evidence to show his good faith in so dealing. Maes had lived in the neighborhood for eighteen years. He had sold his sweet oranges to Hand for defendant in 1908, and received his money therefor from defendant without question. He delivered the oranges so sold at defendant's packing house at Patton, where Hand was in charge as manager. He of course knew that Hand continued so in charge of defendant's business up to and including his sale to him in 1909, which transaction was entered into at the packing house. There was nothing to require a conclusion that he had notice of anything tending to indicate any limitation on his authority to act generally in such business as defendant was conducting in that locality, and it is fairly inferable from the evidence as to the extent to which that business included the absolute purchase of fruit that Maes had knowledge thereof. On the whole, we do not feel that we would be warranted in holding that the findings in regard to Maes are not sufficiently sustained by the evidence.

There is nothing in the point that the contract with Maes is unenforceable because not in writing. If as to him Hand

was authorized to enter into a contract binding on defendant for the purchase of the fruit, his acceptance of such fruit was a sufficient acceptance by defendant to obviate any objection based on the statute of frauds. (Civ. Code, sec. 1624, subd. 4.) What we have said also sufficiently disposes of all the points made in regard to the denial of the motion for a nonsuit and the motions to strike out certain testimony.

The judgment appealed from is affirmed.

Sloss, J., and Shaw, J., concurred.

[L. A. No. 2999. Department One.—November 29, 1912.]

MONTGOMERY & MULLEN LUMBER COMPANY, (a Corporation), Respondent, v. ELLA E. QUIMBY, Appellant.

ADVERSE POSSESSION — COLOR OF TITLE — KNOWLEDGE OF DEFECT IN TITLE.—The fact that an adverse possessor of land believed that he owned the property and recognized no other title is sufficient to establish the good faith necessary to gain title where the adverse possession is under color of title. The mere knowledge of a defect in the title is not sufficient to destroy the adverse character of the possession.

ID.—CONTINUITY OF ADVERSE POSSESSION—TOWN LOT—VACANCY DURING INTERVALS BETWEEN TENANCIES.—It is not essential, in every case, to the continuity of an adverse possession under color of title, that there shall be a continuous personal presence on the land by some person holding for the adverse claimant; and where the property adversely claimed is a town lot, on which buildings had been erected by the claimant, and which when its own use ceased, it let to tenants, the fact that the property remained vacant during intervals between tenancies, did not destroy the continuity of the adverse possession, in the absence of any intrusion thereon by other persons.

ID.—OFFER TO BUY OUTSTANDING TITLE AFTER TITLE HAD BEEN ACQUIRED BY ADVERSE POSSESSION.—The mere offer of the adverse claimant, after his adverse possession had continued for a sufficient length of time to give title, to buy in the claim of the holder of the record title in order to clear his own, was not such an acknowledgment of the outstanding title as operated to break the continuity of the adverse possession.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Charles Monroe, Judge.

The facts are stated in the opinion of the court.

Waldo M. York, and Denis Evarts Bowman, for Appellant.

Sheldon Borden, and George H. Moore, for Respondent.

SHAW, J.—The defendant appeals from the judgment and from an order denying a new trial.

This action was begun on June 12, 1906. The complaint states, in the usual form, a cause of action to quiet title to a town lot. The defendant answered on March 1, 1910. Thereupon leave was granted by the court to the plaintiff to file a supplemental complaint, and on March 11, 1910, such supplemental complaint was filed. It alleged that ever since the nineteenth day of November, 1903, it had been in the open, exclusive, and uninterrupted adverse possession of the lot, claiming title and right of possession against defendant and all others, and had paid all taxes assessed thereon, its claim being founded on a deed from C. R. Davis and wife executed on November 18, 1903, purporting to convey said lot to the plaintiff. Issue was joined on these allegations. The court found that the plaintiff was, and had been ever since November 20, 1908, which was five years after its alleged adverse possession began, the owner in fee of the lot, that defendant had no right or title thereto, and had had none since the last mentioned date, and that the facts alleged in the supplemental complaint were true.

The only point urged is that the finding that plaintiff had gained title by adverse possession is not sustained by sufficient evidence. The original claim of plaintiff that it was the owner of the lot on June 12, 1906, as alleged in its original complaint, appears to have been abandoned by it at the trial and it relied wholly on the title by adverse possession as alleged in the supplemental complaint. No objection appears to have been made to the filing of this supplemental complaint or to the presentation and determination of plaintiff's cause of action as therein stated. The appeal must therefore be consid-

ered as if the action had been begun on March 11, 1910. The supplemental complaint states the cause of action adjudicated.

It was admitted at the trial that the defendant, in 1888, owned the property subject to a mortgage, the amount of which is not shown, that said mortgage was afterwards foreclosed and the lot sold on foreclosure sale, that the defendant was not served with summons in said foreclosure suit and did not appear therein, that on November 18, 1903, Davis, the successor of the purchaser at the foreclosure sale, executed a grant deed to the plaintiff, purporting to convey to it the said lot, and that plaintiff immediately took possession thereof and has paid all taxes thereon regularly ever since.

Mullen, the vice-president of the plaintiff, appears to have had charge of the business on behalf of plaintiff. He testified that immediately after taking possession in 1903, plaintiff inclosed the lot with a fence and erected an office building and a small shed on it, and used the lot as a lumber yard for four years, that ever since 1903 it had held possession of the lot either by itself or its tenants, and that he always believed that plaintiff owned the lot and never recognized any other ownership in it. The defendant had not seen the property or paid any taxes thereon since about the year 1900. This evidence is sufficient to establish adverse possession for the period from November 19, 1903, until March 11, 1910, the date of the filing of the supplemental complaint. The plaintiff's title therefore became complete on November 19, 1908.

Mullen testified that at the time of the conveyance from Davis he knew there was a flaw in the title but did not know what it was. It appeared that in January, 1906, plaintiff was informed of the fact that the title of Davis, its grantor, was founded on a sheriff's deed on the foreclosure sale aforesaid, and that the judgment therein was rendered without service of summons on Mrs. Quimby, the original owner. It is claimed that knowledge of this defect in the title renders the adverse possession subordinate to the title of the real owner and ineffectual to gain title by prescription. The testimony of Mullen that he always believed that plaintiff owned the lot and recognized no other title is sufficient to establish the good faith necessary to gain title where the adverse possession is under color of title. The mere knowledge of a defect in the title is not sufficient to destroy the adverse character of the

possession. (*Wilson v. Atkinson*, 77 Cal. 492, [11 Am. St. Rep. 299, 20 Pac. 66]; *Silvarer v. Hansen*, 77 Cal. 582, [20 Pac. 136]; *Kockemann v. Bickel*, 92 Cal. 667, [28 Pac. 686]; *Millett v. Lagomarsino*, 107 Cal. 106, [40 Pac. 25].)

Another objection is that the possession was not continuous. In December, 1907, more than four years after taking the possession, the plaintiff ceased to use the lot as a lumber yard and removed therefrom the fence and the lumber, but not the building and shed. Mullen testified "I don't recall how long it remained vacant after that time until our tenant took possession. I don't know. Immediately afterward we rented it." He also said that it remained vacant "quite a long time." During this time there was no intrusion by any other person, or any re-entry by Mrs. Quimby, or any disturbance whatever of the plaintiff's possession of the lot. There was no intention by plaintiff to abandon possession and claim of title, or to discontinue possession. These facts do not destroy the continuity of the possession. It is not essential to such continuity, in every case, that there shall be a continuous personal presence on the lot of some person holding for the adverse claimant. It is enough, under the code, that it is devoted to "the ordinary use of the occupant," where the possession is under color of title as it is here. (Code Civ. Proc., sec. 323, subds. 3, 4.) "A man does not discontinue his possession by locking his house in town or suspending his cultivation in the country, provided he do not suffer the building in the one case, or the fields in the other, to be thrown open; but he is bound to continue a positive appearance of ownership, by treating the property as his own, and holding it within his exclusive control." (*Stephens v. Leach*, 19 Pa. St. 265.) The ordinary use of a lot of this character with buildings which the plaintiff does not personally use, is to let it to others. The plaintiff had erected the buildings, and when its own use ceased it let the lot to a tenant who permitted it to remain unoccupied for some time. The buildings were there as a visible sign of its claim and evidence of its continued possession and there is no evidence that it was ever without the control of the plaintiff. Constant occupancy and use is not always required. It depends on the character of the property and the use to which it is adapted. One who owns a house for rental does not abandon or lose his possession

every time it remains vacant during intervals between tenancies. It has been held that one may be in adverse possession of lands suitable only for grazing, although his only occupancy is by pasturing the lands during the grazing season which included only a part of each year, the land being vacant for several months. (*Webber v. Clarke*, 74 Cal. 17, [15 Pac. 431]; see, also, *Marshall v. Beysser*, 75 Cal. 547, [17 Pac. 644]; *Hesperia etc. Co. v. Rogers*, 83 Cal. 11, [17 Am. St. Rep. 209, 23 Pac. 196]; *Jones v. Hodges*, 146 Cal. 164, [79 Pac. 869]; *Webb v. Richardson*, 42 Vt. 473; *Ewing v. Burnet*, 11 Pet. (36 U. S.) 53, [9 L. Ed. 624].) Under these decisions the continuity of the possession was sufficiently established.

Appellant also claims that the continuity was broken by an acknowledgment of her title. It is sufficient to say in answer to this contention that, viewing the evidence most favorably to the plaintiff as we must in support of the finding, the plaintiff merely offered to buy in the defendant's claim in order to clear its title and that this was after its possession had continued for more than five years. This does not bring the case within the rule invoked. (*Furlong v. Cooney*, 72 Cal. 328, [14 Pac. 12]; *Frick v. Sinon*, 75 Cal. 341, [7 Am. St. Rep. 177, 17 Pac. 439]; *Cannon v. Stockmon*, 36 Cal. 535, [95 Am. Dec. 205].)

These comprise the points urged by the appellants. None of them appear sufficient to justify a reversal of the judgment or order.

The judgment and order are affirmed.

Sloss, J., and Angellotti, J., concurred.

[L. A. No. 2968. Department One.—November 30, 1912.]

**BAXTER TODD, Respondent, v. MARY V. L. TODD,
Appellant.**

MORTGAGE—DEED ABSOLUTE IN FORM—PAROL EVIDENCE—SECURITY FOR DEBT.—A deed absolute in form may be shown by parol evidence to have been intended to be a mortgage, and if it was intended merely as security for the payment of a debt, it is a mortgage, no matter how strong the language of the deed or any instrument accompanying it may be.

ID.—EFFECT OF EVIDENCE—QUESTION FOR TRIAL COURT.—Where there is a substantial conflict in the evidence as to the character of the instrument, it is primarily for the trial court to determine whether the evidence in favor of the claim of mortgage is clear and convincing.

ID.—FINDING—EVIDENCE.—The finding that the deed in question was intended as a mortgage, is held to be sustained by the evidence, without substantial contradiction.

ID.—OBLIGATION ESSENTIAL TO MORTGAGE—NEED NOT BE EVIDENCED BY WRITING.—The existence of an obligation to be secured is essential to the mortgage, but it is not necessary that the obligation be evidenced in writing, if in fact there was a debt.

ID.—ACTION FOR REDEMPTION FROM MORTGAGE—PLEADING—MATURITY OF DEBT.—In an action to have a deed declared a mortgage and for its satisfaction upon payment of the loan to secure which it was given, the fact that such loan was due and payable is sufficiently shown by an allegation of the complaint to the effect that the date on which the plaintiff had agreed to pay the loan had passed, and that no part thereof, except a specified amount, had been paid.

ID.—EXCUSE OF LACHES—CONSENT OF MORTGAGEE TO DELAY.—The laches of the plaintiff in delaying the commencement of such action for over thirteen years after the maturity of the loan, is excused, if the defendant, during that period, repeatedly excused and exonerated the plaintiff from the obligation to make further payments on the indebtedness and requested him not to make further payments.

ID.—SALE OF PART OF MORTGAGED PREMISES—CONSENT OF MORTGAGOR—ESTOPPEL.—The grantor under such deed is not estopped to claim it was intended as a mortgage merely because he consented to a sale by the grantee of a part of the premises conveyed, and claimed a credit of the purchase price on the indebtedness secured by the deed.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick W. Houser, Judge.

The facts are stated in the opinion of the court.

George Beebe, for Appellant.

Carter, Kirby & Henderson, for Respondent.

SLOSS, J.—The parties are husband and wife. On June 5, 1895, the plaintiff executed an instrument, in form a grant, bargain, and sale deed, purporting to convey to the defendant a lot in the Victor Heights Tract, in the city of Los Angeles, and twelve and one-half other lots situate in a tract near said city. The complaint in this action alleges that the instrument so executed, although absolute in form, was intended by the parties to be a mortgage to secure the payment of one thousand six hundred dollars, loaned by defendant to plaintiff. The agreement of the parties, as the complaint avers, was that said sum of one thousand six hundred dollars was to be repaid on June 5, 1896, with interest at the rate of seven per cent per annum, payable semi-annually, and if not so paid to be compounded. It is further alleged that on March 1, 1898, the defendant, with plaintiff's consent, sold and conveyed the lot in the Victor Heights Tract to one Deakin for the consideration of one thousand dollars, which was retained by defendant as a payment on the indebtedness above mentioned; that no other payments have been made on said indebtedness. The complaint sets up an offer by plaintiff to pay the balance due, a demand for reconveyance, the defendant's refusal to reconvey, and plaintiff's continued ability and willingness to pay upon receiving such reconveyance. The prayer is for an accounting of the amount due; that the instrument be declared a mortgage, and that defendant be required to reconvey or release upon payment of the amount adjudged to be due.

The answer denies the making of any loan, or that the instrument in question was intended to be a mortgage. The defendant alleges that she purchased the property of plaintiff for one thousand six hundred dollars, and that the deed executed to her was an absolute conveyance, as it purported to be.

She avers that the Victor Heights lot, sold by her, was her separate property. She also sets up the payment by her of certain taxes levied upon the property.

The findings were in favor of the plaintiff on the issues regarding the making of the loan and the purpose with which the deed was delivered and accepted. The court found that the defendant sold the Victor Heights lot for one thousand dollars, and retained said sum as a payment on the indebtedness. It is found that the unpaid balance of the indebtedness, with interest, amounts to \$2,243.67, and that the defendant paid taxes which, with interest, amount to \$196.75. The total sum due from plaintiff to defendant is \$2,440.42, and the judgment decrees that on payment of this sum, the defendant execute and deliver to plaintiff a satisfaction of the instrument of June 5, 1895, which is adjudged to be a mortgage.

The defendant appeals from the judgment, bringing up the evidence by means of a bill of exceptions.

The appellant's principal contention is that the evidence is insufficient to justify the finding that the instrument executed by plaintiff and defendant was a mortgage. That a deed absolute in form may, by parol testimony, be shown to have been intended to be a mortgage is not questioned as, of course, it could not be, in view of the many authorities so holding. A few citations will suffice. (Civ. Code, sec. 2924; *Montgomery v. Spect*, 55 Cal. 352; *Malone v. Roy*, 94 Cal. 341, [29 Pac. 712]; *Woods v. Jansen*, 130 Cal. 200, [62 Pac. 473]; *Holmes v. Warren*, 145 Cal. 457, [78 Pac. 954]; *Couts v. Winston*, 153 Cal. 688, [96 Pac. 357].) If the deed was intended merely as a security for the payment of a debt, it is a mortgage, "no matter how strong the language of the deed or any instrument accompanying it might be." (*Woods v. Jansen*, 130 Cal. 200, [62 Pac. 473].) Although it has often been said that the character of an absolute deed cannot be changed to that of a mortgage except "upon clear and convincing evidence," the rule is well settled that, where there is a substantial conflict, it is primarily for the trial court to determine whether the evidence in favor of the claim of mortgage is clear and convincing. (*Couts v. Winston*, 153 Cal. 688, [96 Pac. 357], and cases cited.) But here we

need not resort to this rule to uphold the finding, since the evidence that the deed was given for security for the debt is not only clear and direct but, in truth, it is without substantial contradiction. The transaction was finally consummated between the plaintiff and one Griffin, the agent of defendant. At Griffin's suggestion, plaintiff executed a deed absolute, and took a paper, signed by defendant, purporting to give to him an option to purchase the lots, within one year, for one thousand six hundred dollars, with interest at the rate of seven per cent per annum. Prior to that time the plaintiff had asked the defendant to lend him one thousand six hundred dollars, and had offered to give her the lots as security, and she had, after some consideration, agreed to comply with his wishes, and referred him to Griffin for the consummation of the deal. There had been no mention of a sale, or of anything but a loan. On these points the testimony of the defendant agreed with that of the plaintiff. Griffin, too, testified that his instructions from Mrs. Todd were to loan the money on the security of the land, and that nothing was said to him about buying the property. In letters written by Mrs. Todd through a series of ten or twelve years, she repeatedly spoke of the property as being "mortgaged" or "encumbered" to her, and said that she had "loaned" the money to plaintiff. Other testimony, too, confirmed the correctness of plaintiff's contention. Opposed to it is nothing but the statement of Griffin that, at the time of the transaction, he had been of the *opinion* that the delivery of the deed would have the effect of a conveyance, if the option should not be acted upon within the year.

The existence of an obligation is, of course, essential to a mortgage. But it is not necessary that the obligation be evidenced in writing, if in fact there was a debt. (*Husheon v. Husheon*, 71 Cal. 407, [12 Pac. 410]; *Locke v. Moulton*, 96 Cal. 21, [30 Pac. 957]; *Montgomery v. Spect*, 55 Cal. 352.) The money having been loaned to the plaintiff, his promise to repay was implied, and was quite as effectual as would have been a promissory note executed by him. (*Couts v. Winston*, 153 Cal. 688 [96 Pac. 357].)

The appellant contends that the complaint is defective in that it does not allege that the plaintiff's indebtedness is due and payable. But the complaint does state that plaintiff

agreed to repay the sum borrowed on the fifth day of June, 1896, and that no part of it, with the exception of one thousand dollars realized from the sale of a lot, had been paid. This was an averment of facts from which the legal conclusion that the balance was due and payable necessarily followed. In *Ganceart v. Henry*, 98 Cal. 281, [33 Pac. 92], relied on by appellant, the complaint contained no allegation that the money was agreed to be repaid at a time prior to the commencement of the action.

It is urged that the plaintiff was guilty of laches in delaying his action for over thirteen years after the expiration of the time for which the loan had been made. But the complaint states a sufficient excuse for the delay in paying or in seeking to enforce redemption by the averment that the defendant "repeatedly excused and exonerated plaintiff from the obligation to make further payments on said indebtedness, and requested him not to make further payments." The finding in support of this allegation is fully supported by the evidence, which also furnishes other grounds justifying the delay.

We cannot agree with appellant's contention that plaintiff is estopped from maintaining this action by his assent to defendant's sale of the Victor Heights lot to Deakin. Undoubtedly he would be estopped to deny Deakin's title, as is, in effect, held in *Wamsley v. Crook*, 3 Neb. 344, cited by appellant. But, since he claims nothing with respect to this lot except credit for the actual purchase price received by defendant, we see no reason why his rights in the lots which have not been sold should be held to be impaired. The sale to Deakin was, in legal effect, a sale made with the consent of both mortgagor and mortgagee. It conveyed a good title to the purchaser, and released the mortgage, *pro tanto*. The authorities cited by appellant are not in conflict with this view.

No other points are presented.

The judgment is affirmed.

Shaw, J., and Angellotti, J., concurred.

[L. A. No. 2981. Department One.—November 30, 1912.]

**PACIFIC IMPROVEMENT COMPANY, Respondent, v.
ROY JONES, Appellant.**

LEASE BY CORPORATION—SIGNING BY INDIVIDUAL—PAROL EVIDENCE OF AGENCY AND AUTHORIZATION.—Where a written instrument of lease purports on its face to be the act of a corporation, but is signed, not by the corporation, but by an individual, a stranger to the contract, parol evidence is admissible, in an action by the corporation to recover the rent reserved, to show that the person signing did so for and on behalf of the corporation pursuant to authority so to do.

ID.—CONSTRUCTION OF INSTRUMENT—LEASE OR EXECUTORY CONTRACT FOR LEASE—INTENT—PART PAYMENT OF RENT.—Whether a written instrument is a lease, or a mere executory agreement to make a lease, depends upon the intent of the parties, to be determined by a construction of the instrument taken as a whole. So construing the instrument in question, it is held, that it was intended to constitute a lease when signed by the respective parties, especially in view of the fact that the lessee entered under it and paid part of the rent at the time of its execution.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Charles Monroe, Judge.

The facts are stated in the opinion of the court.

Ben S. Hunter, and C. C. Towner, for Appellant.

O'Melveny, Stevens & Milliken, and Platt & Bayne, for Respondent.

THE COURT.—The justices of the district court of appeal of the second district, in which this cause was pending on appeal, were unable to concur in a judgment, and they having given their several opinions in writing therein and forwarded to this court copies thereof, the cause was transferred to this court for determination.

The opinion of Mr. Justice Shaw of said district court of appeal, concurred in by Mr. Justice James, in our opinion sufficiently and correctly disposes of all points made by counsel for appellant in their briefs, and we adopt the same as

the opinion of this court. The following is a copy of such opinion:

“Action to recover a balance of \$1,250 rent claimed to be due from defendant to plaintiff under an alleged lease of property for the term of one year.

“Judgment went for plaintiff, a corporation, from which, and an order of court denying his motion for a new trial, defendant appeals.

“The verified complaint, after alleging that on January 21, 1907, plaintiff leased to defendant the property therein described for the term of one year from said date, at the term rental of \$3,000, payable in monthly installments of \$250 each, further alleged: ‘That said defendant has paid upon said rental the sum of \$1,750, and no more, and there is now due and unpaid on said rental the sum of \$1,250.’ The answer denied the making of the lease, or that there was due and unpaid from defendant to plaintiff the sum of \$1,250 thereon, but did not deny the payment by defendant to plaintiff of the sum of \$1,750 rental reserved therein. In support of its contention that it had leased the property to defendant, as alleged in the complaint, plaintiff offered in evidence a document as follows:

“ ‘Santa Monica, Cal., January 21, 1907.

“ ‘MR. ROY JONES,

“ ‘Santa Monica, Cal.

“ ‘Dear Sir: The Pacific Improvement Company will lease to you for school purposes the property known as the Hotel Arcadia, located at Santa Monica, California, for the term of one year, beginning January 21st, 1907, consisting of the hotel building, the grounds adjoining and belonging to the hotel, dressing rooms for surf bathers, barracks or servants’ quarters, at an annual rental of three thousand (\$3000) dollars, payable on the first day of each and every month in monthly payments of two hundred and fifty (\$250) dollars each. You agreeing to lease said property at said rental, and make payments as above mentioned. We will agree to include all furniture, linen, crockery and tableware, now in and belonging to said hotel necessary to accommodate fifty people, an inventory of said property being taken and made a part of this lease. You to pay for all repairs, renewals and improvements of every character in connection with said leased

property, and shall maintain said property, including the grounds, plant and other property in good condition, reasonable wear and tear excepted, and at the termination of said lease as herein provided restore all of said property to said lessor in the same condition as when received, reasonable wear and tear excepted, and you will not make any alterations or additions to said property except after first obtaining the written consent of the undersigned, and if any said personal property shall be destroyed or broken, the same shall be restored of the same quality as the property so destroyed or broken, and the undersigned, or its agents, shall be authorized to enter upon said premises at any time for the purpose of examining the same or of ascertaining whether the terms of this lease are complied with by said lessee, and if said lessee shall fail to comply with any of the covenants herein, or shall not make said payments as herein provided, the lessor may re-enter and take possession of said premises upon demand, and said lease shall at the option of said lessor thereupon terminate; said lessee shall not assign this lease or let or sublet said premises or any portion thereof without first obtaining the written consent of said lessor, and a violation of this provision shall entitle said lessor to re-enter and take possession of said premises and terminate this lease.

“Should the building at any time be damaged by fire or earthquake or elements to render it untenable, then the lease shall terminate.

“ ‘Yours truly,

“ ‘(Sgd) A. D. SHEPARD.

“ ‘(Sgd) ROY JONES.’

“To the introduction of this instrument in evidence defendant objected upon the grounds, 1st, that it did not appear to have been signed by said plaintiff, or by any person representing the plaintiff having authority to sign the same, as shown upon the face of the instrument itself; and, 2nd, that the same did not constitute nor purport to be a lease between plaintiff and defendant. Defendant’s objection was overruled and this objection, based upon these two grounds, constitute the chief reason upon which he bases his claim to a reversal of the case.

“The instrument on its face purports to be the act of the Pacific Improvement Company, but is signed, not by the cor-

poration, but by A. D. Shepard, a stranger to the contract. Under these circumstances, the question as to whether the contract was that of the Pacific Improvement Company depended upon a fact not disclosed by the instrument,—namely: that the signing by Shepard was for and on behalf of the corporation pursuant to authority so to do. It was competent, since the distinction between sealed and unsealed instruments is abolished in this state, to establish the fact, as to which the contract was silent, by parol testimony. (See *Southern Pac. Co. v. Von Schmidt Dredge Co.*, 118 Cal. 371, [50 Pac. 650], and authorities there reviewed.) An examination of the cases cited by appellant *contra* discloses that the question of agency of the party signing for the lessor was not involved therein and no evidence offered thereon. (*Galewski v. Appelbaum*, 32 Misc. Rep. 203, [65 N. Y. Supp. 694]; *Whitford v. Leidler*, 25 Hun, (N. Y.) 136; *Roff v. Duane*, 27 Cal. 565.) The uncontradicted evidence shows that defendant conducted negotiations with Horace G. Platt and A. D. Shepard for the lease of the property; that the former was attorney and acting president of the corporation, and Shepard the general manager thereof, which fact was at said times known to defendant; that as a result of these negotiations Platt, at the office of defendant, dictated the document to a stenographer who transcribed the same; that Shepard, under Platt's instruction and for and on behalf of the Pacific Improvement Company, signed it, and that defendant paid to plaintiff the rent reserved therein covering seven months of said period of one year. The circumstances and evidence thus conclusively show that Shepard in attaching his signature to the paper did so for and on behalf of the corporation, whose general manager he was, and that defendant was fully cognizant that he so acted. The document was shown to be that of the corporation.

“The next point made by appellant is that the instrument is not a lease, but a mere executory agreement to make a lease. The question is one of intent of the parties, and this must be determined by a construction of the instrument taken as a whole. (Tiffany on Real Property, vol. 1, sec. 37; Taylor's Landlord and Tenant, sec. 38.) Thus considered, we find no difficulty in reaching the conclusion that both parties intended the document to constitute a present demise of the premises

for a definite term, commencing on January 21, 1907, the date of the execution of the instrument. While in form the document appears to be a proposal addressed to defendant, nevertheless, the fair import of the language is that when signed by the respective parties thereto it should constitute a lease. The right to possession and entry, as well as the commencement of the time from which rent was to be paid, was contemporaneous with the date of the instrument. There is much in the document that shows that it was regarded as a present demise of the premises. For instance, it is described as 'this lease,' and defendant referred to as 'said lessee'; and it is provided therein that, 'if said lessee shall fail to comply with any of the covenants herein, or shall not make said payments as herein provided, the lessor may re-enter and take possession of said premises upon demand'; and, further, that 'said lessee shall not assign this lease.' Moreover, while the testimony tends to prove that the parties contemplated substituting for this instrument a more formal lease, nevertheless, the execution of the document, as shown by the uncontradicted testimony of Platt, was intended to conclude the lease between the parties, so that Mr. Jones could take immediate possession of the property, the contemplated execution of the formal lease being deemed a matter of mere convenience. The property was leased for school purposes and the evidence shows that it was occupied by the military school as contemplated by the parties. No other lease was ever executed. Furthermore, defendant by answer admits that he paid seven months' rent upon the lease, a fact wholly inconsistent with the theory that such sum was paid by him and received by plaintiff merely upon an executory contract that at some future time plaintiff would lease to him the property for one year from January 21, 1907. The occupation and use of the premises was for the purposes specified in the contract, viz.: 'the military school Mr. Jones was speaking of,' and, as said in *Cheney v. Newberry*, 67 Cal. 125, [7 Pac. 444], 'payment and receipt of the rent was only consistent with a recognition by lessor as well as lessee that the lease was in force.' Actual entry by defendant under the contract would be a circumstance merely tending to establish the fact that the instrument was a lease, but conceding, as claimed by appellant, that the evidence fails

to show entry, nevertheless, he had the right to enter, which right was recognized by plaintiff in accepting the rental."

For the reasons stated the judgment and order appealed from are affirmed.

[L. A. No. 2995. Department One.—November 30, 1912.]

J. M. SEWELL, Respondent, v. MARY L. PRICE and W. R. PRICE, her Husband, and HANNAH CUSHING, Appellants.

CREDITOR'S BILL—PLAINTIFF MAY MAINTAIN ACTION BEFORE JUDGMENT BECOMES FINAL.—The general rule that until a judgment becomes final by affirmance on appeal or by lapse of the time within which an appeal might be taken, such judgment is not admissible in evidence and cannot be relied on as the foundation of rights declared in it, does not apply to an action in the nature of a creditor's bill, the purpose of which is to apply to the judgment creditor's demand property of the judgment debtor which was transferred by such debtor with intent to delay or defraud his creditors.

ID.—RIGHT OF CREDITOR TO ATTACK FRAUDULENT TRANSFER BY DEBTOR—CLAIM MUST BE REDUCED TO JUDGMENT.—Under section 3441 of the Civil Code, a creditor can avoid the act of his debtor for fraud only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer. Consequently he is not in a position to attack a transfer for fraud unless he has a specific lien upon the property transferred or has reduced his claim against the debtor to judgment.

ID.—NATURE OF ACTION—RIGHT TO LEVY EXECUTION.—Such action by the judgment creditor is not, strictly speaking, an action upon his judgment. It is really an action for equitable relief against the obstruction caused by a transfer which hinders him in satisfying his claim by the ordinary process of law, that is to say, by an execution, and if he has put himself in a position to levy execution, he has done everything necessary to enable him to attack the transfer which hinders his enjoyment of his right.

ID.—LEVY OF EXECUTION UNDER MONEY JUDGMENT—ABSENCE OF STAY-BOND.—The fact that the time for appeal has not expired does not prevent the issuance or levy of execution under a money judgment, nor is the right to have execution affected by the fact that an appeal is actually taken, unless an undertaking to stay execution

has been given. Consequently, in the absence of such undertaking, a plaintiff who has recovered judgment may maintain a creditor's bill, notwithstanding the fact that the time for an appeal has not expired, or an appeal has actually been taken and is pending.

ID.—FINDINGS—OMISSION TO FIND AS TO OWNERSHIP OF PORTION OF PROPERTY.—In such an action, where the complaint alleges a fraudulent transfer of an entire piece of land, and the court finds that only a half interest therein was fraudulently transferred, its failure to find upon the title or ownership of the other half interest is without prejudice to the defendants and is not ground for reversal.

ID.—FRAUDULENT INTENT QUESTION OF FACT—SUFFICIENT ALLEGATION AND FINDINGS.—In such an action, the question of fraudulent intent in the transfer is one of fact and not of law, and the fact must be alleged and found. An allegation and a finding that on a certain day the judgment debtor, "with the purpose of concealing his property and defrauding his creditors, and particularly the plaintiff herein, without consideration assigned" the property in question to a specified person, are sufficient.

ID.—TRANSFER OF PROPERTY NOT INVOLVED IN ACTION—FINDING OF FRAUDULENT INTENT NOT NECESSARY.—Where the complaint in such action seeks to set aside the transfer of certain specified properties, and alleges the transfer of other property by the judgment debtor solely for the purpose of showing that he did not have property, other than that involved in the action, out of which the plaintiff's execution might be satisfied, it was not necessary that the court should find that the latter transfer was fraudulent.

ID.—JUDICIAL NOTICE—RECORDS IN DIFFERENT ACTIONS.—Courts cannot in one case take judicial notice of their records in another and different case. The rule that they may take judicial notice of their own records is limited to proceedings in the same case.

ID.—REVERSAL OF JUDGMENT ON WHICH CREDITOR'S SUIT IS BASED.—On an appeal from a judgment in favor of the plaintiff in such creditor's suit, the supreme court cannot, in the absence of any showing in the record, take judicial notice of the fact that the judgment on which the action was founded had been reversed.

ID.—REFUSAL TO CONSIDER REVERSAL—EFFECT OF RIGHTS OF APPELLANTS.—The refusal of the supreme court on the appeal in the creditor's suit to consider the reversal of the judgment on which the action was founded, will not work an irreparable injury to the appellants, because (1), if such judgment has been reversed no execution can issue thereunder, and (2), if the judgment in the creditor's suit be affirmed, adequate relief may be had in an independent action in equity to restrain the plaintiff from taking advantage of the judgment.

HOMESTEAD — PROPERTY OWNED BY HUSBAND AND WIFE IN JOINT OR COMMON TENANCY.—A valid homestead may be selected or claimed

on land which is owned in joint or common tenancy by a husband and wife.

APPEAL from a judgment of the Superior Court of Los Angeles County. W. R. Hervey, Judge.

The facts are stated in the opinion of the court.

John E. Daly, for Appellants.

F. A. Knight, J. V. Hannon, and W. J. Variel, for Respondent.

SLOSS, J.—This action was brought to set aside certain conveyances and transfers of real and personal property claimed to have been made by the defendant W. R. Price to Mary L. Price, his wife, for the purpose of defrauding his creditors. From a judgment in favor of plaintiff defendants appeal on the judgment-roll alone.

The complaint was in four counts, each applying to a different item of property. Common to all four counts are the allegations that the defendants W. R. and Mary L. Price are husband and wife; that on November 4, 1909, a judgment was duly rendered and entered in the superior court of Los Angeles County in favor of the plaintiff and against the defendant W. R. Price for \$7,728.18, and costs amounting to \$101.70; that said judgment is still in full force and effect and entirely unpaid except to the extent of \$5.55, realized by the levy of an execution issued upon said judgment against the property of W. R. Price and returned by the sheriff unsatisfied except in said sum of \$5.55. It is alleged that W. R. Price has no property, other than set out in the complaint, out of which plaintiff's execution could be satisfied, with the exception of one thousand four hundred shares of the stock of the "Building Association of the Society of the New or Practical Psychology," standing in the name of one Clinton Johnson; that this stock, as plaintiff alleges on information and belief, was put in Johnson's name for the purpose of defrauding creditors of said defendant W. R. Price, and that unless the property described in the respective counts of the complaint can be applied to the payment of the judgment the same must remain unpaid.

In addition, the first count alleges that "after perpetrating the fraud upon the plaintiff herein which was the basis of the action upon which plaintiff recovered judgment as aforesaid, to wit, on or about the 20th day of January, 1909, and for the purpose of concealing his property and defrauding his creditors and particularly the plaintiff herein, the said W. R. Price, without any consideration, assigned to Mary L. Price, his wife, two hundred forty-five (245) shares of the capital stock of the 'Building Association of the Society of the New or Practical Psychology,' which belongs to him, and the said stock still stands in the name of the said Mary L. Price, and she falsely pretends that she is the owner of said property as her separate property; that the reasonable market value of said shares is the sum of \$2,450."

It is further alleged in said first count that Mary L. Price has threatened to transfer said capital stock and will transfer it unless restrained by an order of the court.

The second count alleges in terms similar to those contained in the first an assignment by W. R. Price to his said wife of all his interest in and to a deposit in the Citizens Savings Bank of Long Beach. The judgment, however, gives no relief with reference to this deposit and this count, therefore, requires no further notice.

The third count alleges a similar transfer by W. R. Price to his wife of lot seventeen of the Holloway Tract situated in the city of Long Beach.

The fourth count sets forth a like transfer of the north fifty feet of lot four and the east seventy-five feet of the south one hundred feet of said lot in block five of the city of Long Beach. With reference to the last described property it is further alleged that after the transfer to her the defendant Mary L. Price "for the further purpose of deceiving the creditors of W. R. Price . . . executed a mortgage of said property to the defendant Hannah Cushing to secure the payment of a promissory note for \$7,000," payable five years after date. It is alleged that said mortgage was without consideration and was given for the purpose of delaying and defrauding the creditors of W. R. Price.

The defendants answered separately, denying the material allegations of the complaint. In addition, the answer of Mary L. Price alleges that on the fourth day of December,

1908, three days after the date upon which the property described in the fourth count is alleged to have been transferred to her she filed a homestead on said property in due form, which homestead was duly recorded "and that the same is now a perfect, valid homestead on said property" subject to the mortgage of Hannah Cushing.

The findings were in favor of the plaintiff and followed the allegations of his complaint except, as already indicated, with reference to the second count, and except, further, that the court found that the mortgage executed by Mary L. Price to Hannah Cushing was not made without consideration and was not made for the purpose of delaying and defrauding the creditors of W. R. Price. It should also be noted that, while the complaint alleges the transfer by W. R. Price to his wife of the north fifty feet of lot four and the east seventy-five feet of the south one hundred feet of said lot in block five of the city of Long Beach (this being the property described in the fourth count), the court finds that the transfer was of a one-half interest in said property. It also found that on the fourth day of November, 1908, the defendant Mary L. Price filed a homestead on the last above described property, which homestead was recorded as alleged in her answer.

The judgment is that the 245 shares of the capital stock of the Building Association of the Society of the New or Practical Psychology be declared to be the property of W. R. Price and the transfer of the same to Mary L. Price is adjudged to have been fraudulent and void. A like adjudication is made regarding lot seventeen of the Holloway Tract. With reference to the property in lot four of block five, described in the fourth count, it is adjudged that the transfer of a one-half interest therein be declared fraudulent and void, and that Price be declared the owner of said property "subject to the homestead rights filed on the same by Mary L. Price," and subject to the Cushing mortgage. It is further ordered and adjudged that the defendant Mary L. Price be enjoined and restrained from transferring or conveying the 245 shares of the capital stock of the Building Association.

The first point made by the appellants is that the complaint and the findings are insufficient to sustain the judgment in favor of the plaintiff for the reason that they do not show that the judgment for \$7,728.18 and costs recovered by the plain-

tiff against Price is a final judgment. It was not necessary to allege or prove this fact. The general rule undoubtedly is that until a judgment becomes final by affirmance on appeal or by the lapse of the time within which an appeal might be taken, such judgment is not admissible in evidence and cannot be relied upon as the foundation of rights declared in it. (*Feeney v. Hinckley*, 134 Cal. 467, [86 Am. St. Rep. 290, 66 Pac. 580], and cases cited.) But the rule has no application to the case at bar. The present action is of the kind commonly known as a creditor's bill. Its purpose is to apply to the satisfaction of the creditor's demand property of the debtor which was transferred by such debtor with intent "to delay or defraud any creditor or other person of his demands." (Civ. Code, sec. 3439.) Section 3441 of the Civil Code provides that "a creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation." Consequently it is universally held that a creditor is not in a position to attack a transfer for fraud unless he has a specific lien upon the property transferred or has reduced his claim against the debtor to judgment. The rule is thus stated in *Brown v. Campbell*, 100 Cal. 635, [38 Am. St. Rep. 314, 35 Pac. 433], quoting from Bump on Fraudulent Conveyances, second edition, p. 522: "A creditor cannot be said to be delayed, hindered, or defrauded by any conveyance, until some property out of which he has a specific right to be satisfied is withdrawn from his reach by a fraudulent conveyance. Such specific right does not exist until he has bound the property by judgment, or by judgment and execution, as the case may be, and has shown that he is defrauded by the conveyance in consequence of not being able to procure satisfaction of his debt in a due course of law." The bill maintained by a judgment creditor to subject to the payment of his demand property fraudulently transferred by the debtor is not, strictly speaking, an action upon his judgment. It is really an action for equitable relief against the obstruction caused by a transfer which hinders him in satisfying his claim by the ordinary process of law, that is to say, by an execution. If, then, he has put himself in a position to levy execution, he has done everything necessary to enable him to attack the transfer

which hinders his enjoyment of his right. The fact that the time for appeal has not expired does not prevent the issuance or the levy of execution under a money judgment, nor is the right to have execution affected by the fact that an appeal is actually taken, unless an undertaking to stay execution has been given. It must accordingly be held that, in the absence of such undertaking, a plaintiff who has recovered judgment may maintain a creditor's bill, notwithstanding the fact that the time for an appeal has not expired or an appeal has actually been taken and is pending. Such was the ruling of the district court of appeal for the first appellate district in *Jenner v. Murphy*, 6 Cal. App. 435, [92 Pac. 405], and we are cited to no authority holding to the contrary.

The further objection is made that the court failed to find upon the title or ownership of one-half of the property described in the fourth count. It is true that the complaint alleges a transfer of the entire property and that the finding refers only to a one-half interest. But we cannot see that the appellants are in any way injured by the fact that only one-half of the property described in the fourth count is declared to be subject to the plaintiff's demand, or that a finding regarding the other half interest, even though it had been in favor of appellants, would have authorized a judgment more favorable to them. If the further finding would not have had this effect, its absence affords no ground for reversal. (*Windhaus v. Bootz*, 92 Cal. 617, [28 Pac. 557].) The appellants argue that since, under our decisions, a homestead cannot be selected or claimed on lands owned by the claimant as a tenant in common or joint tenant (*Schoonover v. Birnbaum*, 148 Cal. 548, [83 Pac. 999]), the effect of setting aside the transfer of an undivided one-half of the property from W. R. Price to his wife is to invalidate the homestead claimed by her. But the rule does not apply where the joint or common tenancy is that of husband and wife (*Swan v. Walden*, 156 Cal. 195, [134 Am. St. Rep. 118, 20 Ann. Cas. 194, 103 Pac. 931]), which, in the absence of anything to the contrary, we must, in support of the judgment, presume to be the condition here. And, beyond all this, the judgment expressly makes the title of W. R. Price subject to the homestead filed by his wife. Here is an express adjudication of the validity of the homestead. The plaintiff is not appealing and the defendant Mary

L. Price may, therefore, rest with security upon the adjudication that her homestead is valid. In this respect the judgment is in her favor and she is not in a position to attack it because in her opinion the court founded its conclusion upon insufficient premises.

The contention that the court did not make any finding of intent to defraud on the part of W. R. Price is not sustained by the record. We have already quoted the allegations of the complaint, and these allegations are, as to each count, carried into the findings. Thus, taking the first count as an example, it is alleged and found that on or about the twentieth day of January, 1909, "and with the purpose of concealing his property and defrauding his creditors, and particularly the plaintiff herein, the said W. R. Price without any consideration assigned to Mary L. Price, his wife, 245 shares of the capital stock of the Building Association," etc. It is true that in cases arising under section 3439 of the Civil Code the question of fraudulent intent is one of fact and not of law (*Bull v. Bray*, 89 Cal. 286, [13 L. R. A. 576, 26 Pac. 873]), and the fact must, accordingly, be alleged and found. But here is a finding which declares in terms that the transfer was made for the purpose of concealing the debtor's property and defrauding his creditors. Nothing more is required.

It is suggested that the findings are not sufficient to show that the one thousand four hundred shares of stock put in the name of Clinton Johnson were fraudulently transferred to him. He was not a party to the action. The only purpose of mentioning the stock in his name was to show that the judgment debtor did not have property, other than that involved in the suit, out of which plaintiff's execution might be satisfied. If that stock had been fraudulently transferred to Johnson, the plaintiff was prevented from effectually seizing it by execution, and the fact that the stock remained liable for Price's debts was no obstacle to plaintiff's pursuing the property involved in this action. On the other hand, if the transfer to Johnson was *bona fide* and vested the title to the stock in him, the plaintiff could not under any circumstances pursue such stock, and was for that reason in a proper position to attack the transfers made by Price to his wife. In any event Johnson, not being a party to this action, could not, of course, be affected by any judgment rendered herein, even if the court

had undertaken to make an adjudication regarding the stock held by him. But this, as we have seen, it did not do. The judgment contains nothing which concludes anybody with reference to this stock.

Upon the oral argument herein, and by supplemental brief filed after the hearing, the appellants suggest that since the taking of this appeal the judgment recovered by the plaintiff Sewell against W. R. Price for \$7,728.18, upon which the execution mentioned in the complaint herein was issued, has been reversed by this court (*Sewell v. Christie and Price*, 163 Cal. 76, [124 Pac. 713]), and it is claimed that by such reversal the foundation of this action has been destroyed. But, in the absence of anything in the record to show such reversal or to show that the judgment so reversed was the one set up in the complaint in this action, we cannot take notice of the alleged fact. The appellants cite *Hollenbach v. Schnabel*, 101 Cal. 312, [40 Am. St. Rep. 57, 35 Pac. 872], and similar cases, as establishing the doctrine that courts will take judicial notice of their own records. But the rule is limited to proceedings in the same case. It is well settled that courts cannot in one case take judicial notice of their records in another and different case. (16 Cyc. 918; *People v. De la Guerra*, 24 Cal. 73; *Lake Merced W. Co. v. Cowles*, 31 Cal. 214; *Ralphs v. Hensler*, 97 Cal. 296, [32 Pac. 243].)

It might seem, at first sight, that the refusal to here consider the reversal of the money judgment recovered by plaintiff will work an irremediable injury to the appellants. But this is not so. In the first place, the judgment in this case does not direct any seizure or sale of the property involved. It declares that property to be owned by W. R. Price and thus makes it possible to levy upon it an execution directed against the property of W. R. Price. But, if the judgment against Price has been reversed, no execution can issue thereunder. Furthermore, if the judgment in this action is now affirmed, notwithstanding the present existence of facts which make it inequitable that the judgment should stand, and the failure to make those facts appear is due to no fault of the appellants, it is not to be doubted that adequate relief might be had by an independent action in equity to restrain the plain-

tiff from taking advantage of the judgment now under review.
(23 Cyc. 991.)

The judgment is affirmed.

Shaw, J., and Angellotti, J., concurred.

[L. A. No. 3002. Department One.—November 30, 1912.]

T. R. ARCHER, Respondent, v. KATIE HARVEY and L. A. HARVEY, Appellants.

APPEAL FROM JUDGMENT ON JUDGMENT-ROLL—EVIDENCE NOT REVIEWABLE
—SUPPORT OF FINDINGS.—On an appeal from the judgment on the judgment-roll alone, the evidence is not reviewable, and its sufficiency to support findings adverse to a plea of the statute of limitations cannot be questioned.

ID.—STATUTE OF LIMITATIONS—CONTRACT TO CONVEY WATER-RIGHT—PERFORMANCE OF FUTURE LEGAL SERVICES—SPECIFIC PERFORMANCE.
The statute of limitations does not commence to run against a cause of action to specifically enforce, as against the distributee of the estate of a deceased person, a written agreement of the deceased to convey to an attorney at law an interest in a water-right, in consideration of his services to be performed in appealing a case involving such right to the supreme court, until the final judgment of that court on the appeal, and, under section 337 of the Code of Civil Procedure, the cause of action is not barred until the expiration of four years thereafter.

ID.—DECREE DISTRIBUTING WATER-RIGHT—EFFECT OF ON INTEREST ACQUIRED BY CONTRACT.—A decree distributing such water-right to an heir of the decedent as a part of her estate, did not have the effect to bar the interest acquired by the attorney under such agreement. This result follows, whether the agreement be construed to create in favor of the attorney an equitable interest in the water-right at the time of the decedent's death, or that no interest vested in him until, by performance after her death, he became entitled to conveyance.

ID.—EFFECT OF DECREE OF DISTRIBUTION—ADVERSE INTERESTS.—Under section 1666 of the Code of Civil Procedure, a decree distributing the estate of a deceased person to the heirs is not conclusive against one claiming as grantee from such heirs by an instrument executed after the death of the ancestor and before the decree, nor does it

bind third parties who claim an interest adverse to that of the testator or intestate.

APPEAL from a judgment of the Superior Court of San Bernardino County. F. F. Oster, Judge.

The facts are stated in the opinion of the court.

R. E. Bledsoe, for Appellants.

T. R. Archer, for Respondent.

SLOSS, J.—The defendants appeal from a judgment in favor of plaintiff. The appeal is taken on the judgment-roll alone.

The complaint alleges that on November 21, 1898, Hannah S. Skinner, the predecessor in interest of the defendants, entered into a written agreement with the plaintiff, Archer. By the terms of the writing, which is set forth at length in the complaint, Mrs. Skinner, in consideration of services performed for her by Archer as attorney and counsel in a cause entitled B. W. Cave et al. v. George W. Tyler et al., and of further services to be performed “in appealing said cause to the supreme court” and presenting it in said court, and the payment of one-half of the costs and court fees of such appeal, agreed to give to Archer one-half part of such water and water-rights in a certain cienega, as might be awarded to Mrs. Skinner in the aforesaid cause. Archer agreed to faithfully perform the services mentioned, and to pay one-half of the costs of appeal, in consideration of the one-half part of all said waters and water-rights. The complaint goes on to allege the performance by plaintiff of all the obligations on his part. It is alleged that plaintiff conducted the litigation in the action of Cave v. Tyler through two trials in the superior court, and two appeals to the supreme court, the final decision in said cause having been rendered on the fifth day of August, 1905. By that decision it was finally determined that the interest of Hannah S. Skinner, in the waters described in the contract, was and is “two inches of water, continuous flow, measured under a four-inch pressure of and from the waters of said cienega.” There are further allegations as follows: Pending said litigation, in January, 1901, Hannah S.

Skinner died intestate, the owner of said two inches of water, and leaving her surviving two heirs at law, the defendant Katie Harvey, her daughter, and Robert Powell, her son. L. A. Harvey, one of the defendants, is the husband of Katie Harvey. The daughter became administratrix of her mother's estate. During the administration, the defendants acquired the interest of the son, Robert Powell, in said two inches of water, and, upon distribution of the estate of Hannah S. Skinner, the entire estate, including said two inches of water, was distributed to the defendant Katie Harvey. The defendants have ever since owned and held said two inches by such title. The defendant Katie Harvey, as administratrix, was, in 1901, substituted in her mother's place in said action of *Cave v. Tyler*, and thereafter said litigation was conducted by plaintiff under said contract for defendants at their request and with their knowledge and co-operation. Each of the defendants has at all times had knowledge of the contract and of its performance on plaintiff's part. It is alleged that the contract was and is fair and just to said Hannah S. Skinner and the defendants, and that the consideration to be received and actually received for the transfer of the water-right was and is reasonable and adequate. No part of said water-right has been conveyed to plaintiff, and defendants, notwithstanding a demand by plaintiff, refuse to convey it to him. The prayer is that defendants be required to specifically perform the contract by conveying to plaintiff one inch of said two inches of water.

The answer denies many of the foregoing allegations, and, in addition, pleads that the action is barred by the provisions of sections 336, 337, 338, and 339 of the Code of Civil Procedure.

On all these issues the findings were in favor of plaintiff, and a judgment was entered directing a conveyance as prayed.

But two points are made by the appellants. First. It is urged that the court erred in holding that the plaintiff's claim was not barred by the statute of limitations. It is difficult to see how his contention can be advanced on an appeal on the judgment-roll, in view of the fact that there is a finding that the action is not barred. On such appeal, the evidence is not before us, and its sufficiency to support the findings is, of course, not to be questioned.

But, apart from the finding on the statute of limitations, the other facts appearing would not have justified a conclusion that the action was barred. The complaint was filed on the twenty-ninth day of July, 1909. The decision of this court, finally adjudicating Mrs. Skinner's water-rights, was filed on August 5, 1905, less than four years theretofore. The action was one for the specific performance of a contract in writing, executed in this state. The plaintiff's obligation to appeal the case of *Cave v. Tyler*, and present it in the appellate court, was not fully performed until final judgment in that court. Even after the filing of the opinion in August, 1905, a rehearing might have been granted, and plaintiff might have been called upon to render further services. Until complete performance on his part, he was not entitled to demand a conveyance. (*Bartlett v. Odd Fellows' Sav. Bank*, 79 Cal. 218, [12 Am. St. Rep. 139, 21 Pac. 743]; *Thurber v. Meves*, 119 Cal. 35, 38, [50 Pac. 1063, 51 Pac. 536].) Under section 337, the only statutory provision of those pleaded by defendant which has any relevancy to the case, the plaintiff had four years within which to bring his action. This period, as we have seen, had not expired.

Norton v. Bassett, 154 Cal. 411, [129 Am. St. Rep. 162, 97 Pac. 894], cited by appellants, has no application to the facts of this case. That was an action to have a trust declared and for an accounting. The defendants were involuntary trustees, having succeeded to the legal title upon the death of a voluntary trustee. It was held that the cause of action accrued, and the statute began to run, as soon as the title descended to the defendants. The present action was not, like the one in the case cited, brought against the defendants as "dry, involuntary legal trustees." It was brought to compel the specific enforcement of an agreement to convey real property. Since the defendants were not purchasers or encumbrancers in good faith and for value, the obligation was enforceable against them "in like manner" as it could have been enforced against Mrs. Skinner, if she had been alive when the cause of action accrued. (Civ. Code, sec. 3395.) That the action was so regarded by defendants is shown by the fact that they pleaded section 337 of the Code of Civil Procedure, a section properly applicable to a suit to enforce a written agreement. But even if the complaint could be viewed as one

to enforce an involuntary trust, the appellants, by failing to plead section 343, the section applicable in cases like *Norton v. Bassett*, have waived their right to rely on this provision of the statute. (*Bank v. Wickersham*, 99 Cal. 655, [34 Pac. 444].)

Second. The contention is made that plaintiff was bound to present his demand for adjudication to the court in which the administration of Hannah S. Skinner's estate was pending, and that he is barred by the decree distributing the water-right of the decedent to the defendants. Notwithstanding some uncertainty in earlier rulings, the later decisions of this court are clear to the effect that a decree of distribution has no such effect. The decree under section 1666 of the Code of Civil Procedure "is conclusive as to the rights of heirs, legatees or devisees, but it is conclusive against them only as heirs, legatees or devisees,—only so far as they claim in such capacities. . . . It merely declares the title which accrued under the law of descents or under the provisions of the will." (*Chever v. Ching Hong Poy*, 82 Cal. 68, [22 Pac. 1081]; *Martinovich v. Marsicano*, 137 Cal. 359, [70 Pac. 459]; *Cooley v. Miller & Lux*, 156 Cal. 510, [105 Pac. 981].) A decree distributing to the heirs is therefore not conclusive against one claiming as grantee from such heirs by an instrument executed after the death of the ancestor and before the decree. (*Chever v. Ching Hong Poy*, 82 Cal. 68, [22 Pac. 1081]; *Cooley v. Miller & Lux*, 156 Cal. 510, [105 Pac. 981].) Nor does it bind third parties who claim an interest adverse to that of the testator or intestate. (*Theller v. Such*, 57 Cal. 447; *Bath v. Valdez*, 70 Cal. 350, [11 Pac. 724]; *Barnard v. Wilson*, 74 Cal. 512, [16 Pac. 307].) It is immaterial, therefore, whether we say that, at Mrs. Skinner's death, the plaintiff owned an equitable interest in the water-right (*Howell v. Budd*, 91 Cal. 342, 351, [27 Pac. 747]), or that no interest vested in him until, by performance, he became entitled to conveyance. In the first alternative, he claimed adversely to the estate; in the second, his right was acquired after the intestate's death, against the heirs. In neither view was his claim affected by the fact that the court, sitting in probate, undertook to distribute the property to the heirs.

The judgment is affirmed.

Shaw, J., and Angellotti, J., concurred.

[Sac. No. 1896. In Bank.—December 2, 1912.]

**JAMES J. STEVINSON (a Corporation), Appellant, v.
WILLIAM H. JOY, Respondent.**

VENDOR AND VENDEE—WRITTEN CONTRACT—PROVISION MAKING TIME OF ESSENCE—CANNOT BE VARIED BY PAROL—AGENCY.—A provision in a written contract for the sale of land making time and punctuality in the payments of the installments of the purchase price of the essence of the contract cannot be varied by evidence of parol statements made antecedent to the execution of the contract, where there was no extrinsic ambiguity to be explained, and no illegality or fraud to be established. Nor can such provision be varied by evidence of subsequent statements of an alleged agent of the vendor, where the contract expressly declared that no agent had authority to alter or change its terms, and no attempt was made to establish any authorization or power in the agent so to do.

ID.—WAIVER OF FORFEITURE—ACCEPTANCE OF PAYMENTS AFTER MATURITY—NOTICE OF INTENTION TO ENFORCE PROVISION FOR FORFEITURE. Where time is made of the essence of the contract for the payment of rent or other payments of money, and this covenant has been waived by the acceptance of the rent or other moneys after they are due, with knowledge of the facts, such conduct will be regarded as creating such a temporary suspension of the right of forfeiture as could only be restored by giving a definite and specific notice of an intention to enforce it.

ID.—COVENANT AGAINST ASSIGNMENT—SUBLETTING NOT PROHIBITED.—A covenant in a contract for the sale of land against assigning will be strictly construed and will not be held to prohibit a subletting.

ID.—BUILDING ERECTED BY SUBLESSEE NOT AFFIXED TO LAND—AGREEMENT FOR REMOVAL.—A building erected by a sublessee of the vendee, on the property agreed to be sold in pursuance of an agreement between them that it might be removed at any time the sublessee desired, which building was not permanently affixed to the land, but rested upon boards which were not imbedded in the ground or attached to any material affixed to the land, and which might be removed from the land without disturbing it, did not become a part of the realty.

APPEAL from a judgment of the Superior Court of Merced County. E. N. Rector, Judge.

The facts are stated in the opinion of the court.

Frank H. Farrar, for Appellant.

F. G. Ostrander, and H. K. Landram, for Respondent.

HENSHAW, J.—This action was brought by plaintiff to quiet its title to a parcel of land in the county of Merced and to enjoin defendant from removing a building which he had constructed thereon. As to the land in controversy, defendant asserted an interest growing out of the following facts found by the court: On October 1, 1908, the plaintiff, with one Lee Pearson, entered into a written contract, whereunder plaintiff extended to Pearson the privilege of purchasing the land for the sum of \$1,195, upon the payment by Pearson to plaintiff of the sum of two dollars per week until the total sum paid should equal the sum of \$1,195. Pearson was given the right to use and occupy the land during the life of the agreement and under it Pearson did enter into possession of the land. Time, and in particular the time of payments, was declared to be material and of the essence of the contract. The court found that the provision making the punctual payments of the essence of the contract and providing for a forfeiture thereof in case such payments were not made at or within the times limited was waived by the plaintiff; that plaintiff “accepted from said Pearson various sums of money at various times long after the same were due, which it credited upon the said purchase price of \$1,195; and did inform the said Pearson that said weekly payments would not be insisted upon, and before any forfeiture of said privilege to purchase said lands would be declared by plaintiff, that notice of any delinquency in said payments and a demand for the payment of the same would be made upon him by the plaintiff; that on the 19th day of October, 1909, and before any notice of forfeiture of said privilege, or any notice of delinquency of any payment had been given the said Pearson, and before any demand for the payment of any money then due under the said agreement had been made upon said Pearson, the said Pearson forwarded the plaintiff all the moneys due from him to plaintiff at said time under said agreement, but plaintiff refused to accept the same or any part thereof. Plaintiff has never given said Pearson any notice of his delinquency of any of said payments and has never made any demand upon

said Pearson for any payment or payments due under said agreement. Plaintiff has never given said Pearson any notice that it would insist upon the provisions of said agreement as to time being of the essence of said agreement for said weekly payments." Further, the findings show that the defendant leased this land from Pearson at a monthly rental sum of \$4.50, and that defendant was in possession of the leased land under the terms of his lease; that he erected upon the leased land a building of the value of about five hundred dollars, that this building is not permanently affixed to the land, but rests upon boards which are not imbedded in the ground or attached to any material which is affixed to the land; that this building may be removed from the land without disturbing it; that at the time of the erection of the building it was agreed and understood by and between Pearson and the defendant that defendant should have the privilege of removing the building at any time he so desired.

The precise terms of the contract touching the matters hereinafter to be considered are as follows:

"Time and punctuality are hereby made material to and of the essence of this option. Upon termination of the option herein except by purchase, if possession has been taken by first party, second party shall have the right to immediately or at any time thereafter enter upon said land and premises and retake possession thereof, together with improvements and appurtenances thereunto belonging, and said party covenants and agrees that he will then surrender unto said second party upon demand said lots, improvements and appurtenances without delay or hindrance. No waiver of times of payments for continuance of option shall be valid in favor of the first party unless reduced to writing and subscribed by the second party thereto. No assignment of this option shall be valid unless the same be made with the written consent of the second party. It is further understood and agreed that no agent of either party to this option has authority to alter or to change the terms of this option or to bind either party hereto by any statement, except those herein contained."

The court under the findings, which have been sufficiently indicated, gave judgment for defendant, sustaining him in his possession and refusing an injunction against him. From this portion of the judgment plaintiff appeals.

It is first urged that the court erroneously admitted evidence upon which it based its finding that plaintiff "did inform the said Pearson that said weekly payments would not be insisted upon, and before any forfeiture of said privilege to purchase said lands would be declared by plaintiff, that notice of any delinquency in said payments and a demand for the payment of the same would be made upon him by plaintiff." The evidence here referred to is the evidence of Pearson, the party to the option contract made with plaintiff. Pearson was allowed to testify that Whistler, plaintiff's agent, prior to the execution of the contract told him that "as long as a man was trying to do right making his payments, everything would be all right whether or not I had kept up on my land," and that subsequently, after the execution of the contract and when Pearson was in default in his payments that he, Pearson, said to Whistler "in an off-hand way, not thinking but what it was all right, I said 'I suppose if I get behind, would they be apt to take the land from me?' and he said, 'Don't you worry about that.' He said 'It will be credited up to you. There will be a statement if you get behind two weeks.' He said 'There will be a statement sent to you showing you have paid so much and so much in arrears.' " This evidence was clearly inadmissible. As to the first purported statement of Whistler made antecedent to the execution of the contract, it was a bald attempt to vary by parol the terms of a subsequently executed written contract. None of the circumstances under which such evidence is permissible are here present. Even going to the unwarranted extent of saying that this testimony amounted to "evidence of the circumstances under which the agreement was made," still the occasion was not shown which makes evidence of such circumstances permissible. There was no extrinsic ambiguity to be explained; there was no illegality or fraud to be established. (Code Civ. Proc., sec. 1856.) The testimony of Whistler's declaration subsequent to the execution of the contract was equally inadmissible. Here again was a plain effort not only to vary the terms of a written contract, but to vary the terms of a written contract which declares the agreement to be that no agent has authority to alter or change its terms, by showing that an agent of the plaintiff did undertake to do this precise thing, moreover, to show this without any attempt to

establish any authorization or power in the agent so to do. If, therefore, the judgment which the court rendered depended upon the findings based upon this evidence, a reversal would be necessary. But the finding above quoted, to the effect that plaintiff informed Pearson that the weekly payments would not be insisted upon, may be entirely discarded and the judgment still be supported by the finding of ultimate fact,—namely, that plaintiff waived the agreement making time of the essence of the contract.

To a consideration of the evidence and of the law touching this finding we are thus brought. It is shown without dispute that the contract between plaintiff and Pearson was entered into on October 1, 1908; that thereafter he made numerous payments which were received by plaintiff and credited to him under his option contract; that no one of these payments was made within the time limited by the contract; that they were made at irregular intervals from October 1, 1908, until August 21, 1909; that thus in October, 1909, he was twelve weeks overdue in his payments; that he had received no notice from plaintiff demanding the payments and no notice that plaintiff had or would exact the forfeiture because of nonpayment. When, in October, he sent to plaintiff the full amount of the moneys due, he received a letter from plaintiff in response returning the twenty-five dollars which he had sent, the letter stating that it was returned “for the reason that your option to purchase the west half of lot 18, section 14, of the Stevinson Colony has been canceled by us on account of your failure to make your payments when due, in accordance with the conditions expressed in the option formerly held by you.”

Thus, then, is presented the question of the correlative rights of the parties under the facts shown. Appellant insists that by its conduct in accepting the delinquent payments it did no more than to waive its right to declare a forfeiture on account of such delinquencies, but that its right to declare and enforce a forfeiture as to any other delinquencies and to enforce this forfeiture without previous notice to the defendant cannot be questioned. The cases, however, which it cites in support of this position fall far short of sustaining it. *McGlynn v. Moore*, 25 Cal. 384, was an effort to enforce the forfeiture of a lease for a failure to build a warehouse within the time covenanted by the lease. It appeared that after the

failure to build the warehouse the landlord accepted rent. This court declared that this acceptance of rent, with full knowledge of the facts constituting a breach of the covenant was a waiver of the forfeiture, unless the covenant to build was a continuing covenant. It determined upon the language of the lease that it was not a continuing covenant, and the tenant was therefore right in insisting upon a waiver. Clearly this case has no bearing upon the question. In *Jones v. Durrer*, 96 Cal. 95, [30 Pac. 1027], no question of notice to the tenant was involved. The tenant persistently refused to comply with continuing covenants of the lease, and the holding of this court is merely to the effect that waivers of former breaches do not preclude the lessor from maintaining an action for subsequent breaches continuous in their nature. It is equally plain that this case is not in point. The right of plaintiff to maintain an action of forfeiture for breach of the covenant is not here in question. The real question is whether or not the tenant is entitled to notice before the forfeiture is exacted, and if so, to what kind of notice. *Thompson v. Gorner*, 104 Cal. 168, [43 Am. St. Rep. 81, 37 Pac. 900], which appellant declares to be precisely in point and conclusive upon the matter, was an action upon a promissory note which provided for the payment of a monthly interest at eight per cent per annum, but further, that if the principal or interest be not paid as it becomes due, it shall thereafter bear interest at the rate of one per cent per month. The payee, after the principal had become due, had paid interest for a certain time at the rate of eight per cent per annum, and this interest had been accepted. Thereafter, upon a later offer by the payee to pay another month's interest at the rate of eight per cent, the holder of the note refused to receive it and demanded interest at one per cent per month. The payee then tendered to plaintiff the whole amount of the principal due and the amount of interest at eight per cent per annum. This the plaintiff refused to accept. The court held that as to those months in which plaintiff had accepted interest at the rate of eight per cent per annum, there was a waiver of the right to demand one per cent a month; that the acceptance amounted to an executed oral agreement at variance with the terms of the written contract only for the months for which it was accepted. But, says this court, plaintiff "is entitled,

however, to interest at one per cent per month from the time she first demanded it." There is no parallelism between *Thompson v. Gerner* and the case at bar. But applying its reasoning, it would be unquestioned that plaintiff would be entitled to exact prompt payments and to enforce the forfeiture from and after the time it made demand on Pearson, a demand, however, which it never made. These are all the cases cited and relied upon by appellant, and it must be apparent that no one of them touches the question under consideration. The true rule is firmly established and recognized by all the authorities. Where time is made of the essence of the contract for the payment of rent or other payments of money, and this covenant has been waived by the acceptance of the rent or other moneys after they are due, and with knowledge of the facts, such conduct will be regarded as creating "such a temporary suspension of the right of forfeiture as could only be restored by giving a definite and specific notice of an intention to enforce it." Such is the language of *Monson v. Bragdon*, 159 Ill. 66, [42 N. E. 383], quoted with approval by this court after an extensive review of the authorities in *Boone v. Templeman*, 158 Cal. 290, [139 Am. St. Rep. 126, 110 Pac. 947]. So in *Standard Brewing Co. v. Anderson*, 121 La. 935, [15 Ann. Cas. 251, 46 South. 926], the supreme court of Louisiana declares that where month after month the lessor has been receiving payment of the rent a few days later, without objection, if he desires in the future to hold the lessee strictly to payment on the day the rent falls due, he must give him notice to that effect; otherwise, the lessee will not be in legal default from delaying the usual time. In *Barnett v. Sussman*, 116 App. Div. 859, [102 N. Y. Supp. 287], the same principle is declared in a case where realty was sold under a contract providing for payments in monthly installments at regular stated periods, and that on default in any payment the vendor might thirty days thereafter elect without notice, that all payments become forfeited to her as liquidated damages. It was held that the acceptance by the vendor from the beginning of payments not made according to the contract but irregularly as to time and amount, the purchaser being at all times in arrears, was a waiver of the forfeiture clause, which could not be revived, except on notice to the purchasers that if they did not pay the balance due within

a reasonable time specified, the forfeiture would then be exercised. It follows herefrom that the court's finding that plaintiff had waived its forfeiture clause and that the result was that it could not be restored without notice to Pearson and an opportunity to him to make good the delinquent payments cannot be controverted.

Appellant's argument upon the second count,—namely, its right to an injunction to stay the threatened removal of the building is based almost wholly upon its previous contention that Pearson had forfeited his option and that defendant Joy therefore was a mere trespasser upon the property. Its further argument that the clause in the option declaring that an assignment of it should be invalid unless made with the written consent of the plaintiff is without efficacy in this consideration. The distinction between an assignment and a subletting is important and well recognized. A covenant against assigning will be strictly construed and will not be held to embrace the subletting. (18 Am. & Eng. Ency. of Law, 2d ed., pp. 659, 680.) There was, therefore, nothing in Pearson's contract with plaintiff which forbade his subletting to Joy. And, finally, it may be said under the finding of the court, which is not attacked, the building erected by defendant was not attached to and did not become a part of the realty. (*Collins v. Bartlett*, 44 Cal. 371; *Pennybecker v. McDougal*, 48 Cal. 160.) As personal property plaintiff had no right whatsoever to defendant's structure.

The judgment appealed from is therefore affirmed.

Angellotti, J., Sloss, J., and Melvin, J., concurred.

[S. F. No. 5688. In Bank.—December 2, 1912.]

HENRY FOX, CHRYSTAL FOX, and ELIZABETH FOX,
a Minor, by **HENRY FOX**, Guardian of the Estate of
said Minor, Appellants, v. **L. J. HALL, CLARENCE C.**
HALL, and ROSA E. PATCHETT, Respondents.

ACCOUNTING—BREACH OF COVENANT TO PAY MORTGAGE DEBT FROM NET INCOME OF RANCH—PLEADING—PRAYER FOR GENERAL RELIEF—EVIDENCE OF GROSS INCOME—ERRONEOUS NONSUIT.—In an action to recover for the breach of a covenant in an agreement between parties who occupied confidential relations, by the terms of which the defendant promised to pay the net income from a ranch in which the plaintiffs had an interest to the reduction of a mortgaged indebtedness thereon, where the complaint prayed for judgment in a specified sum alleged to be the amount of the net income, and also for general relief, it was error to grant a nonsuit merely because the evidence offered by the plaintiffs showed the receipt of gross income without showing the net income realized. Such evidence, under the prayer for general relief, entitled the plaintiffs to an accounting of the receipts and disbursements of the ranch, and an interlocutory judgment directing such accounting would have been proper. The accounting might have been ordered through a reference, or the court might, with or without a preliminary interlocutory order, have proceeded to take and state the account itself, rendering such final judgment thereon as might appear to be proper.

APPEAL from a judgment of the Superior Court of Sonoma County. Emmet Seawell, Judge.

The facts are stated in the opinion of the court.

James W. Oates, for Appellants.

J. T. Coffman, and A. B. Ware, for Respondents.

THE COURT.—From the judgment which followed the granting of defendants' motion for a nonsuit, plaintiffs appeal.

The averments of plaintiffs' complaint essential to this consideration are the following: Lola Fox (wife of plaintiff, Henry Fox), her brother, Clarence C. Hall, and her sister,

Rosa E. Patchett, defendants herein, were the owners in fee as tenants in common, each seised of an undivided one-third of a certain ranch in Sonoma County. The ranch was encumbered by a mortgage securing an indebtedness of some twenty-nine thousand dollars, due the William Hill Company, a corporation. Lola Fox died in 1905, and her husband, Henry Fox, became administrator of her estate, which in due course was distributed in equal shares to the heirs of Lola Fox,—namely, her husband and her children, Chrystal Fox and Elizabeth Fox. In February, 1905, and before administration upon the estate of Lola Fox, but after her death, Henry Fox and Chrystal Fox entered into a written agreement with L. J. Hall, the father of Lola and of Clarence C. Hall and Mrs. Patchett. This agreement provided that the undivided interest of Lola Fox, deceased, in the ranch above mentioned (which interest by her death had descended to Henry Fox, Chrystal Fox, and Elizabeth Fox) should “remain in the custody and control of said L. J. Hall, and to his use, during his natural life, provided and so long as said Clarence C. Hall and Rosa E. Hall (now Patchett) take no steps to divide or partition the said lands. But during the time the same shall so remain in the custody and control of said L. J. Hall he is to pay all taxes on the same and shall pay upon the mortgage debt now subsisting against the same the net income from the same until said mortgage debt is paid off.” The complaint then alleges the receipt of large sums of money annually by L. J. Hall as the net income of the ranch, his failure to devote any portion of this net income to the payment of the mortgage debt, the foreclosure of the mortgage and the compulsory payment by the administrator of the estate of Lola Fox of \$11,314.70, the one-third part of the mortgage debt at the time of foreclosure. Specifically it is averred that in the year 1905 the net income of the said one-third interest in said lands so received by L. J. Hall was five thousand dollars, in the year 1906, five thousand dollars, and in the year 1907, six thousand five hundred dollars, and it is further averred that no part of this income had ever been paid over to plaintiffs or for their use.

It is further charged that the defendants Clarence Hall and Rosa Patchett knew of the agreement; knew of their father's intent, alleged in the complaint to have existed when he made

the agreement, not to perform his covenant to pay the net income upon the mortgage debt, and that they joined with and assisted their father to dispose of all the net income by expending it for improvements upon lands belonging to Clarence and Rosa, and that defendants Clarence and Rosa became purchasers at the foreclosure sale. It is also alleged that L. J. Hall is insolvent. For relief plaintiffs demanded a judgment against L. J. Hall for the sum of \$11,314.70 with interest, and a lien upon the ranch property now owned by Clarence and Rosa for whatever part of this \$11,314.70 L. J. Hall had expended for improvements upon it. A like lien is sought upon other real estate owned by Clarence and Rosa for such portion of the net income as might have been by Hall expended upon these lands. There was also a prayer for general relief. The complaint was unverified. L. J. Hall made answer by general denial; Clarence and Rosa answered separately by general denial, and further pleaded a specific defense not necessary to set forth.

The evidence was clearly insufficient to have supported any judgment against Clarence Hall or Rosa Patchett, and so far as these defendants are concerned, the motion for nonsuit was properly granted. They were not parties to the contract upon which the claim of plaintiffs is founded. The theory of the complaint apparently was that the lands of Clarence and Rosa should be held for the amount of net income expended thereon by L. J. Hall, because L. J. Hall had, with their knowledge, made his agreement without intending to perform it, and because he was insolvent and therefore unable to compensate plaintiffs by a payment to them of an amount equal to the net income which he had failed to apply to the satisfaction of the mortgage debt. We need not inquire whether this theory is well founded in law, since there was no attempt to introduce evidence in support of the supposed facts on which it rests. The record contains no testimony tending to show that L. J. Hall, when he made his agreement, intended to violate it, or, by necessary consequence, that his codefendants knew of such intent. Nor is there any evidence to sustain the allegation of insolvency.

With respect to the defendant L. J. Hall, the case presents a different aspect. The plaintiffs introduced evidence tend-

ing to show the making of the contract as alleged, the occupancy of the ranch by L. J. Hall, the receipt of large sums of money derived from the sale of products of the ranch, the failure on the part of L. J. Hall to pay any part of the mortgage debt, and the satisfaction by the estate of Lola Fox of one-third of the mortgage, amounting to \$11,314.70.

There was, however, no proof of the expenses incurred in operating the ranch; in other words, the plaintiffs made a showing of gross income, but none of net income realized. They failed, therefore, in establishing their allegation that L. J. Hall had received sufficient net income to have paid off the mortgage, or any part of it, and were not, as the proof stood when they rested, in a position to demand judgment against L. J. Hall for any specific sum. But the fact that they were not entitled to all the relief which they had asked did not justify a nonsuit. The complaint closed with a prayer for general relief. It is the right, indeed the duty, of the court to grant any relief consistent with the case made by the complaint and embraced within the issues. (Code Civ. Proc., sec 580; *Hurlbutt v. N. W. Spaulding Saw Co.*, 93 Cal. 55, [28 Pac. 795]; *Zellerbach v. Allenberg*, 99 Cal. 57, [33 Pac. 786].) The contract between the plaintiffs and L. J. Hall, followed by his possession of their property and the management thereof entitled them to an accounting from him of such management, and of the receipts and disbursements, to the end that they might then demand the payment of any net income which should have been applied to the reduction of the mortgage debt. The facts alleged and proved showed the existence of a fiduciary relation sufficient to invoke the jurisdiction of a court of equity to compel an accounting, which, as the evidence shows, had been demanded of the defendant L. J. Hall. (1 Cyc. 427; *Wooster v. Nevills*, 73 Cal. 58, [14 Pac. 390]; *Green v. Brooks*, 81 Cal. 328, [22 Pac. 849]; *San Pedro Lumber Co. v. Reynolds*, 111 Cal. 588, [44 Pac. 309]; *Coward v. Clanton*, 122 Cal. 451, [55 Pac. 147].) Upon such accounting, the burden would probably be upon the said defendant to establish any expenditures or credits upon which he might rely as offsets to the gross income shown to have been received by him. (1 Cyc. 448; *Marvin v. Brooks*, 94 N. Y. 71; *Thatcher v. Hayes*, 54 Mich. 184, [19 N. W. 946].) But be that as it may, the plaintiffs

were entitled to an accounting, and if the case had been submitted without further evidence, an interlocutory judgment directing such accounting would have been proper. (1 Ency. of Plead. and Prac., p. 102; 1 Cyc. 447; see *Duff v. Duff*, 71 Cal. 513, [12 Pac. 570].) The accounting might have been ordered through a reference, or the court might, with or without a preliminary interlocutory order, have proceeded to take and state the account itself (*Emery v. Mason*, 75 Cal. 222, [16 Pac. 894]), rendering such final judgment thereon as might appear to be proper.

The judgment in favor of the defendants Clarence C. Hall and Rosa E. Patchett is affirmed.

The judgment in favor of the defendant L. J. Hall is reversed.

Beatty, C. J., does not participate in the foregoing decision.

[S. F. No. 5866. Department Two.—December 3, 1912.]

H. O. SMITH, Respondent, v. J. R. WOODS et al., Appellants.

PROMISSORY NOTE—BONA FIDE PURCHASER—EVIDENCE—TESTIMONY IN PRIOR ACTION FOR CANCELLATION—JUDGMENT UPHOLDING BONA FIDE PURCHASE.—In an action upon promissory notes by one claiming as a *bona fide* assignee for a valuable consideration before maturity, in which the defense was that the notes had been obtained by fraud to which the plaintiff was a party and of which he was charged with knowledge, the reporter's record of the entire testimony given on the trial of a prior action instituted by the makers of the notes to cancel them on account of the fraud, is inadmissible in support of such defense, where a judgment had been entered in the prior action to the effect that the assignee had acquired the notes for a valuable consideration, before maturity as a purchaser in good faith.

ID.—POSSESSOR MAY MAINTAIN ACTION ON NOTE.—In the absence of bad faith, an action upon a note cannot be defended upon the ground that the title is not in the plaintiff, if the plaintiff has possession and the defendant would be protected by the payment of any judgment on the note.

APPEAL from a judgment of the Superior Court of Fresno County and from an order refusing a new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

Henry Hawson, and E. A. Williams, for Appellants.

Frank H. Short, and F. E. Cook, for Respondent.

MELVIN, J.—Defendants appeal from a judgment against them and from an order denying their motion for a new trial. The action was upon three promissory notes each for the principal sum of one thousand two hundred dollars. Plaintiff herein sued as an assignee of the notes for a valuable consideration before maturity and as one who received them in good faith. The defense alleged was that the notes had been obtained by J. B. McCrairie, the payee thereof, by false and fraudulent representations in a transaction involving the sale of a certain stallion; that plaintiff had been a party to the fraud and that he had taken the instruments in question with full knowledge of their fraudulent taint.

Defendants rely upon two assignments of error in asking for a reversal of the judgment against them. These are (1) that the court erred in excluding certain evidence offered to prove the alleged fraud which induced the making of the notes; and (2) that one of the notes was improperly admitted in evidence because, as appellants contend, the real owner was not a party to this suit. There had been another action entitled Woods et al. v. McCrairie, in which the plaintiffs were the persons who appear as defendants here. That was a suit to cancel the notes here involved. The complaint therein contained the identical allegations of fraud which were set forth in the answer in this case. At the trial of this case counsel for defendants offered the reporter's record of the testimony received in the trial of the former case. Plaintiff's counsel made no objection to the form of the offered testimony, but opposed its admission upon the ground that the defense sought to be established thereby had been passed upon by the court in the former action and adjudicated adversely to the contention of these defendants, a judgment having been

entered in the earlier action to the effect that this plaintiff had acquired the notes for a valuable consideration, before maturity as a purchaser in good faith. This objection was properly sustained by the court. Much of appellant's brief is devoted to a discussion of the alleged errors committed in Woods et al. v. McCrairie. If there were material errors in that trial they would have been available upon the appeal of that cause, but they have no place here where all of the evidence taken in that case was offered in bulk as there received. No matter what the condition of the record in Woods et al. v. McCrairie may have been, the ultimate fact remained that upon the evidence adduced in the trial of that cause, the court, acting within its proper jurisdiction had entered a judgment against the plaintiffs therein and that was a subsisting judgment at the time of the trial of this cause.

There is nothing in the other point made by appellants that plaintiff H. O. Smith is not the real party in interest in the action upon one of the notes. This is based entirely upon the fact that the note in question bore an indorsement of an order to pay the sum mentioned therein to John W. and Edgar W. Loyd. This is signed by the plaintiff, but he swore that the note was his property acquired September 20, 1909; that it had never been out of his possession; that while the purported assignment had been written by him the note had never been delivered to the Loyds. In the absence of bad faith an action upon a note cannot be defended upon the ground that the title is not in the plaintiff, if plaintiff has possession and defendant would be protected by the payment of any judgment on the note. (*Dyer v. Sebrell*, 135 Cal. 597, [67 Pac. 1036]; *Naglee v. Lyman*, 14 Cal. 453; *Bank of Lassen County v. Sherer*, 108 Cal. 513, [41 Pac. 415].) It has been held that even the owner of the equitable right to a part of the proceeds of a note is not a necessary party to an action on the note. (*Curtis v. Sprague*, 51 Cal. 239; *Caldwell v. Lawrence*, 84 Ill. 161.)

The judgment and order are affirmed.

Henshaw, J., and Lorigan, J., concurred.

[S. F. No. 5880. Department Two.—December 8, 1912.]

JOAKIM LANG, as Administrator of the Estate of Albert Lang, Deceased, Appellant, v. THE LILLEY & THURSTON COMPANY et al., Respondents.

PRACTICE—DISMISSAL—DEFAULT IN FILING AMENDED COMPLAINT—DELAY FOR FORTY-EIGHT DAYS—PROMISE OF COUNSEL NOT TO TAKE DEFAULT.—Where a judgment dismissing an action against certain defendants was entered after the plaintiff had been in default for forty-eight days in failing to file a fourth amended complaint, after demurrers had been sustained to the three prior complaints, it cannot be said that the trial court abused its discretion in refusing to vacate the judgment, where it appears that such court believed the defect in the complaint, so far as such defendants were concerned, was incurable, and was on the point of sustaining the last demurrer without leave to amend, and the only showing made to excuse the delay was that counsel for such defendants had verbally promised not to take a default. Such a promise did not mean that plaintiff might go on indefinitely without pleading.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing to vacate a judgment of dismissal entered upon the default of the plaintiff in failing to file an amended complaint. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Costello & Costello, and A. W. Brouillet, for Appellant.

Linforth & Herrington, and C. H. Wilson, for Respondents.

HENSHAW, J.—This is an appeal by the plaintiff from an order refusing to vacate a judgment entered in favor of the defendants Mahony Brothers. The following are the facts: Plaintiff had filed three complaints, to all of which demurrers had been sustained. To his last complaint, the second amended complaint, plaintiff confessed demurrer and asked and obtained ten days' time within which to file a third amended complaint. By stipulation between the attorneys this time was extended ten days. When the time thus extended by stipulation was about to expire on August 31, 1910,

plaintiff's attorney telephoned the attorney for Mahony Brothers, respondents herein, asking a further extension of time. The affidavit of plaintiff's attorney upon this matter is "that he communicated with C. H. Wilson, Esq., attorney for the defendants, Mahony Brothers, asking him if the time for filing the third amended complaint would be extended by him. Said C. H. Wilson replied, saying that he would not take a default against plaintiff." The affidavit of Mr. Wilson declares an absolute want of recollection of this incident and conversation, asserts affiant's belief that the conversation did not take place, and insists that if it did take place the import of the declaration was, and was only, that respondents' attorney would not take an immediate default against plaintiff, but would allow him a reasonable time in which to secure an order or a stipulation extending his time to plead. It should be added that the action was brought against several parties for their negligent conduct resulting in the death of plaintiff's intestate; that by his demurrers Mr. Wilson was successfully pressing his contention that there was an improper joinder of causes of action and of parties defendant in plaintiff's complaints, and that plaintiff's complaints did not show any liability upon the part of Mahony Brothers. The asserted conversation relative to the granting of further time occurred on August 31, 1910. Counsel for defendants Mahony Brothers did not take judgment of dismissal for default until October 19, 1910. During the interval of forty-eight days counsel for plaintiff neither obtained nor sought any extension of time.

This application for relief is based on section 473 of the Code of Civil Procedure, and from the foregoing statement of facts it is manifest that the sole question is whether or not the court abused its discretion in denying the application for relief. The rule of decision and the course of conduct of this court in dealing with such appeals has been well expressed in *Ingrim v. Epperson*, 137 Cal. 370, [70 Pac. 165], where it is said: "While it has been said in some cases that this discretion is better exercised when it tends to bring about a decision of the cause upon its merits, the rule itself (not to disturb an order setting aside, or refusing to set aside, a default except in clear cases of an abuse of discretion by the lower court) has never been relaxed. This observation has

been in the nature of advice to the superior court, and not for the purpose of compelling it to decide in that mode. Unless the record clearly shows that the court has abused its discretion, its order, whether it be to grant or deny the application, will be affirmed." It is, of course, the province of the trial court to determine the truth when it is put in doubt by conflicting statements in the affidavits. In view of the fact that the trial court believed the defects in the complaint so far as the Mahony Brothers were concerned were incurable and was on the point of sustaining the last demurrer without leave to amend; in view further of the opposing statements of fact in the affidavits, and, finally, of the unquestioned fact that the attorney for plaintiff neglected for forty-eight days to secure any stipulation of extension of time, it cannot be said that the statement attributed to Mr. Wilson that he would not take default against plaintiff meant that plaintiff might go on indefinitely or forever without pleading. The delay of forty-eight days was unexplained and unexcused. In view of all these facts and circumstances it cannot be said that there was any abuse of discretion in the order appealed from.

It is, therefore, affirmed.

Lorigan, J., and Melvin, J., concurred.

[L. A. No. 2887. In Bank.—December 5, 1912.]

H. G. HENDERSON, Administrator of the Estate of John J. Davies, Deceased, Respondent, v. J. G. DE TURK, Appellant.

TAXATION—DEED TO STATE—ERRONEOUS RECITAL OF NAME OF PERSON ASSESSED—INVALIDITY OF DEED—IDEM SONANS.—Where the name of the person assessed appeared on the assessment-roll as "E. W. Davis," a recital in the deed to the state that the name of such person was "E. W. Davies," renders the deed void, and it cannot be validated by applying the rule of *idem sonans*.

ID.—NAME APPEARING ON ASSESSMENT-ROLL MUST BE RECITED.—The provision of section 3785 of the Political Code that the deed to the state based on a sale for delinquent taxes must recite the

"name of the person assessed," requires the recital of the name of the person assessed as it appears on the assessment-roll. A failure to observe such requirement renders the deed void, and is not remedied or cured by either section 3807 or 3628 of that code. Neither of those sections purports to apply to the deed made to the state in pursuance of a delinquent tax-sale.

ID.—TAX DEED AS EVIDENCE OF REGULARITY OF TAX PROCEEDINGS.—

Section 3787 of the Political Code makes such a tax deed evidence of the regularity of such proceedings as are named therein only when it is a deed conforming to the requirements of the law.

ID.—RULE OF CONSTRUCTION OF TAX DEEDS IS ONE OF PROPERTY.—

It has been uniformly held in this state that a tax deed which misrecites or omits to recite any one of the facts required by the statute to be recited has no effect at all as a conveyance. The theory is that it is competent for the legislature to prescribe the form of instrument which, as the result of a proceeding *in invitum* can alone divest the citizen of his title, and that where the statute prescribes the particular form of the tax deed, the form becomes substance, and must be strictly pursued, and it is not for the courts to inquire whether the required recitals are of material facts or otherwise. This rule has become one of property from which the courts should not depart.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

C. A. Stice, for Appellant.

Carter, Kirby & Henderson, for Respondent.

THE COURT.—Appeal from a judgment in favor of plaintiff and an order denying motion for new trial in an action to quiet title to certain real property in Los Angeles County.

Defendant claims solely under a deed from the state based on a sale and alleged deed to the state on account of delinquent taxes. The deed to the state recited the name of the person assessed as "E. W. Davies," while the assessment was to "E. W. Davis."

The law in force both at the time of the sale and the time of the execution of the deed, provided that the deed to the state must recite, among other things, "the name of the per-

son assessed." (Pol. Code, sec. 3785.) This means, of course, the name of the person assessed *as it appears upon the assessment-roll*. It has uniformly been held in this state that a tax deed which misrecites or omits to recite any one of the facts required by the statute to be recited has no effect at all as a conveyance, the theory being that it is competent for the legislature to prescribe the form of instrument which, as the result of a proceeding *in invitum* can alone divest the citizen of his title, and that where the statute prescribes the particular form of the tax deed, the form becomes substance, and must be strictly pursued, and it is not for the courts to inquire whether the required recitals are of material facts or otherwise. (See *Baird v. Monroe*, 150 Cal. 560, 564, [89 Pac. 352] and cases there cited.) The particular point here involved was decided in *Grimm v. O'Connell*, 54 Cal. 522, where the assessment was to "Charles Grimm," and the tax deed recited that the property was assessed to "Charles Grimm and all owners or claimants known or unknown." It was held, upon the theory above stated, that the deed was void because it failed to correctly recite the name of the person assessed. There are other decisions holding that any such deed is void when it misrecites or omits to recite any one of the facts required by statute to be recited therein, and there is no decision laying down a different rule. As is substantially said in respondent's petition for a rehearing, these decisions constitute a rule of property from which the court should not depart.

The deed cannot be held valid by applying the rule of *idem sonans*, if we are to adhere to the ruling in *Emeric v. Alvarado*, 90 Cal. 444, 465, [27 Pac. 356]. There the assessment was to "Castero," while the owner's name was "Castro." The court said: "It is not a case to which the rule of *idem sonans* applies. Tax proceedings are *in invitum*, and, to be valid, must closely follow the statute, and *idem sonans* applies to cases of pleas of misnomer and issues of identity, where the question is whether the change of letters alters the sound—not to assessments and other cases of description, where the written name is material. 'Different letters will make different names, though the sound be the same.' The deed to Pollard described the land sold as having been assessed to 'Castro' and does not purport to be made in pursuance of

an assessment to 'Castero.' '' While there is a diversity of opinion in other jurisdictions on this point, we think this ruling should be followed in this state.

The failure of the deed to the state to recite correctly the name of the party assessed is not remedied or cured by either section 3807 or 3628 of the Political Code. Section 3628 refers only to the "assessment." Under it, an "assessment" is not rendered invalid by reason of a mistake in the name of the owner. Section 3807 of the Political Code, provides: "When land is sold for taxes correctly imposed as the property of a particular person, no misnomer of the owner, or supposed owner, or other mistake relating to the ownership thereof, affects the sale, or renders it void or voidable." This section has existed in its present form ever since the codes were adopted in 1872, and was the law when the deed involved in *Grimm v. O'Connell*, 54 Cal. 522, was held invalid. It was cited in the argument in that case. It does not purport to apply to the deed made in pursuance of the sale and, as the law now stands, five years thereafter in the event that no redemption has been had, and cannot be held to dispense with the requirement that the deed shall correctly recite the name of the person to whom the property was assessed, as a condition to its validity. Until a valid deed is made to the state, the state cannot sell the property to another (Pol. Code, sec. 3897), and the owner has the right to redeem at any time prior to a valid sale *by the state*. (Pol. Code, sec. 3780.)

Section 3787 of the Political Code, makes such a tax deed evidence of regularity of such proceedings as are named therein only when it is a deed conforming to the requirements of the law.

The learned judge of the trial court did not err in holding that the deed was invalid.

The judgment and order denying a new trial are affirmed.

[L. A. No. 3268. Department One.—December 10, 1912.]

In the Matter of the Estate of MARY B. PURCELL, Deceased. JAMES F. GARNER et al., Contestants and Appellants; CHARLES A. PURCELL et al., Respondents.

WILL—REVOCATION OF PROBATE—FRAUD—DEFECTIVE EXECUTION—EVIDENCE.—In a proceeding to revoke the probate of a will, it is held that the trial court was justified in holding that there was no substantial evidence of fraud or of any defective execution of the will.

ID.—UNDUE INFLUENCE—OPPORTUNITY TO EXERCISE—INVALIDATING WILL.—In order to invalidate a will on the ground of undue influence, mere evidence that the persons alleged to have exercised such influence had the opportunity to do so and might have done so if they had been so disposed and had possessed such influence, is insufficient. The undue influence must actually exist, it must be actually exerted and it must be so exerted as to affect the terms of the will.

ID.—CONFIDENTIAL RELATIONS WITH TESTATRIX—PRINCIPAL AND AGENT—BURDEN OF PROOF.—The fact that the confidential relation of principal and agent existed between the testatrix and an executor and beneficiary under her will, does not of itself prove that the will was procured by undue influence arising from that relation, nor cast upon him the burden of proving the absence of such influence at the time of its execution.

ID.—EVIDENCE—ATTORNEY WHO DREW WILL—CROSS-EXAMINATION TO REBUT INFERENCE OF UNDUE INFLUENCE.—Where in support of the issue of undue influence, the contestants, on the direct examination of the attorney who drew the will, elicited evidence tending to create an inference that a person charged with the exercise of undue influence was unduly active in the matter of the execution of the will and was endeavoring to influence the testatrix in his favor, it was proper for the proponents, on cross-examination of the attorney, to show what actually occurred during his consultation with the testatrix at her house in reference to the terms of the will and at a subsequent interview between them at his office at the time the will was executed, where such facts would tend to rebut such inference.

ID.—MENTAL CAPACITY—IMPAIRMENT OF MEMORY DUE TO AGE.—A testatrix having a slight impairment of memory due to old age which led her to rely on others more than she otherwise would, but who was nevertheless able to and always did think, talk, and act rationally, and manage such of her affairs as she there had in hand with

reasonable prudence and judgment, was not mentally incompetent to make a will.

ID.—MEDICAL TESTIMONY—OPINION BASED ON ERRONEOUS ASSUMPTION OF FACTS.—An opinion of a medical expert as to the mental incompetency of the testatrix, based upon a hypothetical question which assumed facts in respect to her mental condition entirely variant from those shown by the uncontradicted evidence, and upon a misconception of the effect of the evidence, cannot be given any probative force.

ID.—WANT OF TESTAMENTARY CAPACITY—EVIDENCE—NONSUIT PROPERLY GRANTED.—On a contest of a will on the ground of the want of testamentary capacity by the testatrix at the time of its execution, it is held, upon a review of the evidence on that issue, that the trial court was warranted in granting a nonsuit, and that on the whole case no reasonable person could believe that the testatrix had not sufficient mental capacity to make the will.

ID.—ADMISSION OF ONE OF SEVERAL LEGATEES—INCOMPETENT EVIDENCE. On a contest of a will on the ground of undue influence, evidence of a statement made by one of several legatees, which was in effect an admission tending in some degree to prove undue influence, is incompetent.

ID.—IMPEACHMENT OF PARTY'S OWN WITNESS—PRELIMINARY SHOWING.—On the trial of such a contest, the contestants cannot impeach their own witness by evidence of contradictory statements, unless they first show that they had been misled or surprised by the testimony he gave.

ID.—PROPOSERS' BILL OF COSTS—TIME OF FILING—JUDGMENT.—A ruling of the trial court granting a motion for a nonsuit on the contest of a will is not the judgment of the court, and the proponents' cost-bill is filed within the time allowed by section 1033 of the Code of Civil Procedure, if it be filed within five days after the judge signed the draft of the form of the judgment which was afterward entered in the minute-book.

ID.—FINDINGS NOT REQUIRED—DECISION.—No findings are necessary to such a judgment, and hence the "decision" referred to in section 1033 of the Code of Civil Procedure must be understood in such cases, to mean a judgment entered upon a motion.

APPEAL from a judgment of the Superior Court of Los Angeles County denying a petition for the revocation of a will, and from an order denying a motion to strike out a cost-bill. Frank J. Finlayson, Judge.

The facts are stated in the opinion of the court.

Ball & Ball, Thomas Ball, Murphy & Poplin, and Park Henshaw, for Appellants.

Valentine & Newby, and E. A. Meserve, for Respondents.

SHAW, J.—Mary B. Purcell died testate on May 15, 1910. Her last will was executed on June 18, 1909, and was admitted to probate on June 1, 1910, on the petition of Charles A. Purcell and two other persons, all of whom were named therein as executors. Within a year thereafter the present proceeding was begun by certain of her heirs to revoke the probate of her will. The grounds alleged were: 1. That it was procured by the fraud and undue influence of Charles A. Purcell and others in collusion with him; 2. That at the time of its execution the testatrix did not have testamentary capacity, and 3. That it was not duly executed. Upon the trial, after hearing the evidence offered by the contestants, the court, on motion of the defendants, directed a nonsuit, and thereupon rendered judgment against contestants, dismissing and denying their petition for revocation. From this judgment the contestants appeal. They afterward moved to strike out the cost-bill filed by the defendants. This was denied, and they appeal from the order denying said motion.

1. The court was justified in holding that there was no substantial evidence of fraud or of any defective execution of the will. The rulings upon these points are not seriously attacked and we need not discuss the subjects.

2. The undue influence consisted of the alleged domination and control of Charles A. Purcell, assisted by Hannah D. Burke and Fannie Mayer, whereby they induced her to make a will in their favor contrary to her own wish and inclinations. Purcell was a brother, and Mrs. Burke a sister, of the deceased husband of the testatrix. Fannie Mayer was her housekeeper who, with Mrs. Burke, had lived for many years in the same house with the testatrix. The estate in question was worth over four hundred thousand dollars and was chiefly derived from her deceased husband, who died in 1901. Charles A. Purcell had been her business adviser and manager ever since the death of her husband. The most that can be said of the evidence on this branch of the case is that it shows that they

had the opportunity to exercise undue influence upon her in the matter of the making of this will and might have done so if they had been so disposed and had possessed such influence. This, however, is not sufficient. The undue influence must actually exist, it must be actually exerted and it must be so exerted as to affect the terms of the will. There is no substantial evidence of either of these conditions. The fact that the confidential relation of principal and agent existed between the testatrix and Purcell does not in itself prove that the will was procured by undue influence arising from that relation, nor cast upon him the burden of proving the absence of such influence at the time of its execution. (*Estate of Morcel*, 162 Cal. 188, [121 Pac. 733]; *Estate of Ricks*, 160 Cal. 461, [117 Pac. 532]; *Estate of Langford*, 108 Cal. 621, [41 Pac. 701]; *In re Calkins*, 112 Cal. 301, [44 Pac. 577].) There is no evidence that either of them suggested to her any of the provisions contained in the will.

3. In this connection it is proper to consider the claim that the court improperly allowed the cross-examination of L. H. Valentine to proceed upon matters beyond the scope of the examination in chief. Valentine was the attorney who drew the will and supervised its execution. Upon the examination in chief he testified that he had known Charles A. Purcell for about a year and a half prior to the execution of the will; that his residence was in Los Angeles about three hundred feet distant from that of Mrs. Purcell; that on June 17, 1909, the evening before the will was executed, at about seven o'clock, Charles A. Purcell came to his residence and stated that Mrs. Purcell had requested him, Purcell, to go to the house of the witness and ask witness to come to her house and see her about making a will; that Purcell did not sit down upon delivering this message, but left immediately; that in about half an hour, in response to the request, witness went to Mrs. Purcell's house and was admitted by either Mrs. Mayer or Mrs. Burke, and was directed to go upstairs to Mrs. Purcell's room; that he had no other conversation there and saw no one else; that he proceeded alone to Mrs. Purcell's room and there found Mrs. Purcell, Miss Smith, the nurse, and either Mrs. Burke or Mrs. Mayer; that the other persons except himself and the testatrix left the room and closed the doors; that he and Mrs. Purcell remained in the room from

about seven thirty until after ten o'clock. He then made an appointment with her to come to his office the next morning to execute the will which he was to prepare, and he went from her house directly to his own house, seeing no person on the way. He next saw Mrs. Purcell on the following morning before ten o'clock at his office. She was accompanied by Charles A. Purcell and Miss Smith as far as the reception room. She then went into his inner office and remained there at least an hour while she was executing the will. He saw Charles A. Purcell again that week on the street and again in May, 1910, at the time of her death, and he again saw Mr. Purcell in August, 1910.

On the cross-examination he was allowed to relate in detail all the conversation that occurred in the two interviews between him and Mrs. Purcell at her house and in his office. This evidence disclosed a prolonged conversation between them that evening, in which she discussed at length her affairs, her previous wills, her wishes concerning her relatives, and the disposition of her large estate, and in which she exhibited a familiarity with them and a fairly complete and accurate comprehension of all these subjects. It also tended to show that the will was the result of her own volition and not of suggestions by Mr. Purcell or any other person. The matters disclosed by the examination in chief were not relevant to the issue of mental incapacity. The evidence was offered by the contestants on the issue of undue influence. In this connection it is necessary to note that other evidence showed that Mr. Valentine had never before been consulted by her and that Mr. Murphey, attorney for the contestants, had drawn a former will. Also that there was some other evidence tending to create an inference that Mr. Valentine and Mr. Purcell were together in a room at Mrs. Purcell's house on the evening of and just preceding the consultation, no one else being present. The purpose of proving the few incidents related upon the examination in chief obviously was to show that Charles A. Purcell was instrumental in procuring the services of the attorney who prepared the will; that he and Mrs. Burke were in or about the house at the time of the consultation and that Mr. Purcell accompanied her to the attorney's office the next day when she went there to sign the will. The object was to prove facts which might cause the jury to infer that

Mr. Purcell was unduly active in the matter and that he was endeavoring to influence the testatrix in his favor, and from these facts to infer that the will was the product of his influence.

This being its purpose and effect, so far as it had any effect, it was proper for the other party on the cross-examination to show what actually occurred during the consultation and at the interview at the office, in order to rebut the inference, sought to be raised by the contestants from the facts brought out in the examination in chief, that Purcell or Mrs. Burke were in some way instrumental in directing or controlling the provisions of the will. The evidence on cross-examination did tend to rebut such inference and it was, therefore, within the discretion of the court to allow it to be given. (*People v. Rozelle*, 78 Cal. 84, [20 Pac. 36]; *People v. Teshara*, 141 Cal. 638, [75 Pac. 338]; *Jackson v. Feather R. W. Co.*, 14 Cal. 23; *Graham v. Larimer*, 83 Cal. 180, [23 Pac. 286]; *People v. Buckley*, 143 Cal. 388, [77 Pac. 169]; *People v. Gallagher*, 100 Cal. 475, [35 Pac. 80].)

4. We now come to the question whether or not there was evidence to support a verdict that the testatrix was of unsound mind at the time of the execution of the will if the case had been submitted to the jury. The will was made in anticipation of and shortly before a severe surgical operation upon the testatrix. She was then seventy-one years of age. There is some evidence which, if taken separately and apart from the qualifications and explanations which accompanied it, would tend to prove mental incapacity. For example, the surgeon who performed the operation upon the testatrix testified that from his observation and conversations with her during the two months from June 12 to August 11, 1909, it was his opinion that she was not of sound mind on June 18th, the date of the will. But, in explanation and on examination in chief, he said that she was affected only by a general enfeeblement of all the mental faculties, called by physicians *senile dementia*; that this begins as soon as a person's memory begins to fail because of age; that it was of varying degrees and that it did not necessarily or immediately destroy the capacity to transact business. It further appeared from his examination that it did not cause him to hesitate to enter

into an engagement with her to perform the serious operation which she underwent. On cross-examination he said that the testatrix was, during that time, rational, both in appearance and in conversation; that she was not insane and did not appear to be insane; that she had no delusions, and that what he meant by saying that she was of unsound mind was that there was some failure of memory or judgment. These were not made as statements inconsistent with those made on the examination in chief. He evidently regarded the respective statements as entirely consistent with each other. His theory appears to have been, as some of the medical witnesses stated it, that her unsoundness of mind was of a medical nature; that her brain was not perfect because of the deterioration of age. Being asked for details showing mental unsoundness, he said that her mind was slow; that she did not grasp things quickly and had to take time for reasons and answers; that she would not decide about having the operation without advising with her brother-in-law, Charles A. Purcell; that she said she had always relied on Purcell to transact her business; that she talked about founding a hospital, asked the witness about the cost of a hospital, and seemed to rely on the opinions of the witness and others about it, but that in all she said she was rational both in manner and in the reasons she gave, and her ideas, though expressed slowly, were expressed well and clearly.

It is clear from all this that, although the physician was of the opinion that as a matter of medical science her mind was not physically entirely sound, all that he meant by that opinion was that she had a slight impairment of memory due to old age which led her to rely on others more than she otherwise would; but that she was nevertheless able to and always did think, talk, and act rationally, and manage such of her affairs as she there had in hand with reasonable prudence and judgment. The witness himself appeared to believe that she should have decided about the operation without consulting her brother-in-law, who had been for years her trusted business manager. The medical profession may describe such a condition as *senile dementia* and declare such a person mentally unsound, but it does not constitute the sort of incompetency or insanity which, in the estimation of law and of men of ordinary sagacity and prudence, renders

a person incapable of executing contracts or making a will. Her conduct and conversation, as detailed by the physicians, rather tended to show that she herself was aware of her failing memory of recent events and that she prudently chose to rely upon others in whom she had confidence in her business affairs, and that in all other respects she had at least ordinary wisdom, judgment, and mental capacity.

There was also the testimony of three physicians who had never known the testatrix, given in answer to a hypothetical question, to the effect that, assuming that the facts stated in the question were true and fairly described her condition, she was of unsound mind at the time she executed the will; that *senile dementia* had affected her so that her memory was defective, her will weakened and her former judgment impaired sufficiently to make her incompetent. The question put did not state the case fairly nor fairly describe her condition. It included every statement contained in the evidence which tended in the least to show *senile dementia*, or which by any possibility could be construed to have that tendency, and it excluded the explanations, qualifications, and modifications accompanying those statements, as given by the witnesses who made them. In this way it presented a distorted and inaccurate description of the condition of the testatrix, as shown without conflict by the evidence as a whole. For example, the question stated that she appeared to the physicians at the hospital as an infirm, feeble old lady with her mental faculties impaired, enfeebled and breaking down and suffering from a loss of memory, but it did not state their testimony that at the same time she was not insane but was sane and rational and that the reasons she gave for what she was doing appeared to be good, sound, and rational. Again the question included a passage from the will in which she declared that she had always desired to devote a large part of her property to charity, but that under the "exigencies of this will" she was not then "able to designate the particular charities" to which she desired to extend her bounty; that Charles A. Purcell knew her desires in that regard and that she left the matter wholly to him, without imposing upon him any duty or trust in regard thereto. This passage was taken by these physicians as evidence that her memory was at that time so bad that she could not

recollect her wishes on the subject or the charities she had previously had in mind, and their opinions were, in part, based upon this supposed fact. In truth, however, the evidence showed, without conflict, that she was correctly advised by her attorney that, under the laws of California, she could not by her will give more than one-third of her estate to charity; that for that reason she could not make the charitable bequests that she desired, and that this clause was inserted for the purpose of informing her acquaintances that she had not entirely forgotten the charitable intention she had so often expressed to others in her lifetime, and that the language of the clause was chosen by her attorney to accomplish that object and at the same time to avoid creating a precatory charitable trust, which trust would likewise have been invalid as to the excess over one-third of the estate. The passage did not at all indicate the want of memory or feebleness of mind which the physicians attributed to it. One, at least, of these physicians based his conclusion, in part, on facts not given in the hypothetical question. An opinion given by an expert upon assumed facts so variant from those shown by the uncontradicted evidence and upon such misconceptions of the effect of some of them cannot be given any probative force, even in the absence of the other evidence already stated explanatory of the mental condition of the testatrix.

There was also the testimony of some acquaintances, more or less intimate, that they were of the opinion that she was of unsound mind shortly before she made this will. But of these witnesses, Hallett said that she always talked rationally and coherently, knew all about her relatives, talked intelligently on whatever was the subject of conversation, and was rational every time and seemed to know what she was talking about; and that he could not say she was insane. His reasons for thinking her of unsound mind were that she had changed in her actions; that after telling a thing she would sometimes repeat it in twenty minutes; that her mind was not "concentrated" particularly and that she thought a good deal about her death. Mrs. Jeannette A. Garner was of a like opinion because the testatrix was so forgetful that "she could not remember anything she said or did ten minutes before." On cross-examination she said that she could not

say that the testatrix was insane, but that she was not of a strong mind; that after the operation the testatrix gave her a small table and asked her to pick it out herself and the witness thought the fact that the testatrix asked her to select it indicated that she was not of very strong mind; also that she borrowed five hundred dollars from the testatrix in September after the operation and that she did not at that time think anything about the testatrix being of unsound mind and did not know anything about it; that she would not term it an unsound mind but not a very strong mind, and that she got the explanation of the term "unsound mind" from the doctors. Evidently what the witness meant by stating that the testatrix was of unsound mind was that she had some impairment of the mental faculties usual to old age. It is significant also that these acquaintances did not hesitate to deal with the testatrix and none of them ever seemed to have contemplated such a proceeding as having her declared incompetent and put under guardianship, notwithstanding the fact that she had such a large estate subject to her disposal.

The testimony of Mr. Valentine is not, strictly speaking, in conflict with any evidence of the witnesses as to her mental condition. He spoke of the time when she was actually making her will. He gave at length the conversations between him and her regarding it. These conversations not only showed an entire absence of influence of any other person at that time, but also showed that the testatrix was at that time entirely sane and capable of understanding her affairs, of remembering her relatives and family connections and of making a testamentary disposition of her estate. A reading of this testimony is convincing to the effect that there is no foundation for the idea that she was then so lacking in mental capacity or that there was then such a failure of memory that she was incapable of executing a will. If there were times when she was incapable of transacting business the time when she executed the will was clearly one of her lucid intervals. A careful reading of the whole evidence brings us to the same conviction as that which actuated the trial judge in granting a nonsuit, a conviction that on the whole case no reasonable person could believe that she had not sufficient mental capacity to make the will in question.

Questions of this character have often been presented to this court. In *Estate of Chevallier*, 159 Cal. 168, [113 Pac. 133], it is said: "It is important, preliminarily, to observe that it is not every form of insanity, not every mental departure from the normal, which destroys an otherwise valid testamentary act. The rule of law is not that no person who is insane may make a valid will, but that the will of no person who by reason of insanity is incapable of making valid testamentary disposition shall be upheld. Thus, the wills of aged and infirm people, of people sick in mind, as well as in body, are always upheld, if, notwithstanding their enfeeblement, testamentary capacity is shown. So, again, it may be well and perhaps soundly reasoned that all persons who commit crime and that all persons who commit suicide are aberrant, abnormal, and therefore insane. But such is not the insanity which the law has in mind. It must be an insanity of one of two forms, either insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity, under which the testator is the victim of some hallucination or delusion. And, even in the latter class of cases, it would not be sufficient merely to establish that a testator was the victim of some hallucination or delusion to avoid the will. The evidence must go further and establish that the will itself was the creature or product of such hallucination or delusion, or, in other words, that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument." In *Estate of Dole*, 147 Cal. 191, [81 Pac. 535], we said: "Even in old age, if the testator knows his property and the manner in which it is invested, and his relatives who are the object of his bounty, he may make a valid will. It is not necessary that his memory be perfect. The aged person often fails to remember the details of business and the names of his friends, but this is often the case with persons in the prime of life. The memories and reasoning powers of people, even in the prime of life, differ as the features of each individual differ in a multitude of ten thousand." In *Estate of Redfield*, 116 Cal. 637, [48 Pac. 794], the judgment of the court below was that the testatrix made the will in question while she was of unsound mind. The facts shown by the evidence are related at length and make fully as strong a case as that disclosed in

the case at bar. Nevertheless, the court held that it was insufficient in law to support the judgment and reversed the case for that reason.

For these reasons we conclude that there was no error in directing a nonsuit upon the issue of mental incapacity.

5. A number of rulings upon the admission and exclusion of evidence are assigned as error. Many of them were cured by the subsequent admission of the evidence thus excluded. These we will not mention.

That the court correctly excluded testimony of a statement claimed to have been made by Charles A. Purcell, the residuary legatee, to the effect that "he wrote the will and Valentine put it in legal form," is settled by the decisions of this court in *Estate of Dolbeer*, 149 Cal. 245, [9 Ann. Cas. 795, 86 Pac. 695], and *Estate of Dolbeer*, 153 Cal. 662, [15 Ann. Cas. 207, 96 Pac. 266]. The excluded statement was no more than an admission tending in some degree to prove undue influence. Being an admission of one of several legatees, against the validity of the will, it was incompetent, under the rule established by those cases.

The testimony of Mrs. Garner as to statements made by the witness, L. H. Valentine, was properly rejected. Valentine was contestants' own witness, the evidence offered was incompetent, except for the purpose of impeaching him, and this contestants could not do unless they first showed that they had been misled or surprised by the testimony he gave. They made no attempt to show such deception or surprise. The ruling would have been harmless even if it had been erroneous. The statements imputed to Mr. Valentine by the question put to Mrs. Garner, so far as they were material at all, related wholly to the issue of undue influence and if admitted they would not have strengthened the contestants' other evidence on this branch of the case sufficiently to have established it.

6. The appeal from the order refusing to vacate the judgment for costs and strike out the cost-bill is without merit. The minutes of the daily proceedings of the court of January 9, 1912, state that the motion for nonsuit was "renewed by defendants in the presence of the jury and motion granted by the court." On January 10th, in pursuance of this ruling, a formal judgment of nonsuit, including judgment in favor of defendants for their costs, was drawn and signed by

the judge presiding in the case. On January 12th this formal judgment was filed and entered in the judgment book. The record so designates this book but it was evidently intended to refer to the "minute-book" in which probate orders and decrees are required to be entered. (Code Civ. Proc., sec. 1704.) The ruling granting the motion for a nonsuit was not, as the appellants claim, the judgment of the court. The judgment upon that ruling was not made until at least the following day when the judge signed the draft of the form therefor, and was not filed or entered until January 12th. The court had not lost jurisdiction of the case, and its judgment entered on January 12th was the only judgment in the cause. The cost-bill was filed on January 15, 1912, five days after the judgment was signed. This was within the time allowed by law. (Code Civ. Proc., sec. 1033.) No findings are necessary to such a judgment, and, hence, the "decision" referred to in the section just cited must be understood, in such cases, to mean a judgment entered upon a motion.

The judgment and order appealed from are affirmed.

Angellotti, J., and Sloss, J., concurred.

Hearing in Bank denied.

[Sac. No. 1927. In Bank.—December 10, 1912.]

In the Matter of the Estate of FREDERICK COX JOBSON,
Deceased. E. C. JOBSON, Appellant, v. SUE C. JOB-
SON, Respondent.

**ESTATE OF DECEASED PERSONS—SUCCESSION TO SEPARATE PROPERTY OF
INTESTATE—SOURCE OF PROPERTY IMMATERIAL.**—The statute of
succession in this state, in providing for the disposition of the sep-
arate property of one dying intestate, makes no distinctions based
upon the channel through which the property may have come to the
decendent.

Id.—RIGHT OF INHERITANCE—ADOPTION—STATUTORY REGULATIONS.—
The right of inheritance, and also the subject of adoption and the

rights and obligations springing therefrom, are purely matters of statutory regulations.

ID.—EFFECT OF ADOPTION—NATURAL RELATION SUPERSEDED.—The effect of an adoption under the Civil Code is to establish the legal relation of parent and child, with all the incidents and consequences of that relation, between the adopting parent and the adopted child. This necessarily implies that the natural relationship between the child and its parents by blood is superseded.

ID.—RIGHT OF SUCCESSION BY ADOPTING PARENT—EXCLUSION OF NATURAL PARENT.—As the act of adoption confers upon the adopted child the right to succeed to the estate of the adopting parent in like manner as a child of the blood, it follows that, upon the death of the child, the adopting parent is entitled to inherit as a parent, to the exclusion of the parent by blood.

ID.—DEATH OF ADOPTING PARENT—NATURAL RELATION NOT REVIVED.—The relation of parent and child, which existed between the parent by blood and the child prior to the adoption and which was supplanted by the new relation thereby created, is not revived by the death of the adopting parent prior to the death of the child.

ID.—DEATH OF CHILD AFTER DEATH OF ADOPTING PARENT—NATURAL PARENTS DO NOT SUCCEED TO ESTATE.—Upon the death intestate of the adopted child after the death of the adopting parent, the parents by blood have no right of inheritance as parents to the child's estate.

APPEAL from an order of the Superior Court of Sacramento County denying a petition for the partial distribution of the estate of a deceased person. C. N. Post, Judge.

The facts are stated in the opinion of the court.

Louis Oneal, Owen D. Richardson, and O. G. Hopkins, for Appellant.

George & Hinsdale, for Respondent.

SLOSS, J.—Appeal from an order denying a petition for partial distribution.

The decedent, Frederick Cox Jobson, was the legitimate child of E. C. Jobson, the appellant, and Jennie A. Jobson, his wife. In April, 1889, Frederick Cox Jobson, then three years of age, was adopted by his maternal grandfather, Frederick Cox. The adoption proceedings, which took place in the county of Sacramento, where all of the parties concerned

resided, were regular and valid, having been conducted in strict conformity with the requirements of the Civil Code. (Secs. 221 to 230.) Both the father and the mother duly consented in writing to the adoption, as did the wife of Frederick Cox. Thereafter Frederick Cox Jobson became, and until his death remained, a member of the family of said Frederick Cox and his wife, Jennie Cox.

On March 25, 1906, Frederick Cox, the adopting father, died testate, having bequeathed a legacy of ten thousand dollars to his adopted son. In June, 1909, Frederick Cox Jobson, the adopted son, died intestate, owning no property except a portion of the legacy which had been bequeathed to him by Frederick Cox. He left surviving a widow, Sue C. Jobson (the respondent herein), his father in blood (the appellant), his mother in blood, Jennie A. Peltier, formerly Jennie A. Jobson, and Jennie Cox, the widow of Frederick Cox, the adopting parent. He left no issue.

The father, E. C. Jobson, filed his petition for partial distribution, contending that he was entitled to one-fourth of the estate of the decedent. And such was clearly his right (Civ. Code, sec. 1386, subd. 2), if, in contemplation of law, he was the "father" of Frederick Cox Jobson at the date of the latter's death. On the other hand, the respondent takes the position that the adoption proceedings terminated the legal, as distinguished from the natural, relation of father and child between the respondent and the decedent, and that, under subdivision 4 of section 1386, she, the widow, was entitled to the entire estate. This was the view taken by the court below.

It may properly be observed, at the threshold of the inquiry, that the rights of the parties are not affected by the circumstance that the estate in dispute was derived entirely from the adopting parent. The source from which the property came may well influence one's notions of the natural equity of the appellant's claim. But our statute of succession, in providing for the disposition of the separate property of one dying intestate, makes no distinctions based upon the channel through which the property may have come to the decedent. "Succession to estates is purely a matter of statutory regulation which cannot be changed by the court." (*In re Ingram*,

78 Cal. 586, 588, [12 Am. St. Rep. 29, 21 Pac. 435]; see, also, *McCaughey v. Lyall*, 152 Cal. 615, 617, [93 Pac. 681].)

The case turns, then, upon the meaning and effect of the sections of the Civil Code relating to adoption. As the right of inheritance is purely a matter of statutory regulation, so is the subject of adoption and the rights and obligations springing therefrom. (*Ex parte Chambers*, 80 Cal. 219, [22 Pac. 138]; *Ex parte Clark*, 87 Cal. 641, [25 Pac. 967]; *Estate of Johnson*, 98 Cal. 536, [21 L. R. A. 380, 33 Pac. 460].)

The sections important to be considered here are 227, 228, and 229 of the Civil Code. Section 227 as it read at the time of the adoption in question provided for the making of an order by the judge (the word "court" has since then been substituted for "judge"), declaring "that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting." Section 228 reads: "A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation." Section 229 is as follows: "The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it."

These sections do not in terms provide for the inheritance by the adopted child from the adopting parent or *vice versa*. Whatever the rule may be with respect to the right of succession, it must apply to both parties alike. The language defining the relationship created by the adoption is applicable to both alike, and it is difficult, therefore, to see how any discrimination can be made between the party adopting and the child adopted. "After adoption," says section 228, "the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation." If, therefore, the act of adoption confers upon the child the right to succeed to the estate of the adopting parent in like manner as a child of the blood, it must follow that, upon the death of the child, the adopting parent is entitled to inherit as a parent. The decisions of this court establish beyond the possibility of dispute the proposition that the adopted child is entitled to so inherit. (*Estate*

of *Newman*, 75 Cal. 213, [16 Pac. 887]; *Estate of Evans*, 106 Cal. 562, [39 Pac. 860]; *Estate of Williams*, 102 Cal. 70, [41 Am. St. Rep. 163, 36 Pac. 407].) In *Estate of Newman*, the court, referring to the provisions of sections 227 and 228, said: "The language is general and comprehensive. . . . If the adopted child is by virtue of its *status* to be 'regarded and treated in all respects as the child of the person adopting' and is to 'have all the rights and be subject to all the duties of the legal relation of parent and child,' the right to succeed to the estate of the deceased parent must be included." There are other decisions which may be cited as exemplifying the disposition of the court to treat the act of adoption as creating a relation which produces, as between the parties, the legal results flowing from the natural relationship of parent and child. Thus in *Estate of Taylor*, 131 Cal. 182, [63 Pac. 345], it was held that, on an application for the appointment of a guardian, the residence of the adopting parent was to be regarded as the residence of the child adopted. Adopted children of the daughter of a testator have been held to be included within the term "any lineal descendant" of the decedent, and thus exempted from the burden of a collateral inheritance tax. (*Estate of Winchester*, 140 Cal. 468, [74 Pac. 10].) An adopted child is a "child," within the meaning of section 1365 of the Code of Civil Procedure, and thus entitled to letters of administration of the estate of the adopting parent. (*Estate of Camp*, 131 Cal. 470, [82 Am. St. Rep. 371, 63 Pac. 736]; *Estate of McKeag*, 141 Cal. 404, [99 Am. St. Rep. 80, 74 Pac. 1039].) In *Younger v. Younger*, 106 Cal. 377, [39 Pac. 779], a decree of divorce, granted to the wife, had given her the custody of a minor child. Thereafter the child was adopted by its grandparent. Thereby, as this court held, the court which had rendered the divorce decree was ousted of jurisdiction to modify the portion of the decree relating to the custody of the child. "By the adoption proceeding," it was said, "the *status* of the child was wholly changed; it became *ipso facto* the child of another, and ceased to sustain that relation, in a legal sense, to its natural parents."

These various rulings seem to establish the doctrine that the effect of an adoption under our Civil Code is to establish the legal relation of parent and child, with all the incidents and

consequences of that relation, between the adopting parent and the adopted child. This necessarily implies that the natural relationship between the child and its parents by blood is superseded. The duties of a child cannot be owed to two fathers at the same time. If the decedent, Frederick Cox Jobson, had died intestate, leaving surviving both his natural father and his foster-father, Frederick Cox, it cannot be doubted that the latter would have been entitled to inherit such portion of the decedent's estate as, under our statute of distribution, descended to the father. The appellant, E. C. Jobson, the natural father, would have been entitled to nothing, for the reason that he had, by virtue of the adoption proceeding, ceased to sustain the legal relation of father to the decedent. Is his situation altered by the fact that the foster-father died before the adopted child? We do not see that it is. There is nothing in the statute which limits the effect of the adoption to the period of the lives of the adopting parent and the adopted child. To sustain the appellant's contention, we should have to hold that, although the relation of parent and child, existing between him and the decedent, was supplanted by the new relation created by the adoption, it was again revived by the death of the foster parent. Such a holding would be to make, rather than to construe, a statute. Once we have reached the conclusion that the effect of an adoption under the code is to substitute the adopting parent for the parent by blood, we must give to that conclusion its logical results. From the time of the adoption, the adopting parent is, so far as concerns all legal rights and duties flowing from the relation of parent and child, the parent of the adopted child. From the same moment, the parent by blood ceases to be, in a legal sense, the parent. His place has been taken by the adopting parent.

It should perhaps be added that the case before us presents no question of the effect of adoption upon the rights of any persons except the natural parents, the child, and the adopting parent *inter sese*. There is no occasion to express any opinion, and we express none, upon the existence of rights that might be claimed collaterally by either party to the adoption; that is to say, as against the natural kin of the other. It would no doubt be possible to suggest contingencies in which the views we have expressed would lead to embarrassing and

difficult problems. But we think the same may be said of any other view that might be adopted.

We have not deemed it necessary to discuss at any length the decisions in other jurisdictions. The statutes of other states differ materially from ours, and the cases on the subject therefore afford no great aid to us. For example in such cases as in *In re Namaau*, 3 Hawaii, 484, *White v. Dotter*, 73 Ark, 130, [83 S. W. 1052]; *Hole v. Robbins*, 53 Wis. 514, [10 N. W. 617]; *Reinders v. Koppelman*, 68 Mo. 482, [30 Am. Rep. 802], and *Upson v. Noble*, 35 Ohio St. 655, in which it was held that the adopting parent could not inherit from the child, the statute or adoption agreement, in each instance, contained language which either expressly or by implication limited the right of inheritance to the child. On the other hand, in Indiana, where the statute more closely resembles the provision of our Civil Code, the court, after first denying the right of the adopting parent to inherit (*Barnhizer v. Ferrell*, 47 Ind. 335), has, upon a later review of the question, reached the contrary conclusion. (*Humphries v. Davis*, 100 Ind. 275, [50 Am. Rep. 788]; see, also, *Calhoun v. Bryant*, (S. D.) 133 N. W. 266.)

On the whole case, we are satisfied that the court below correctly ruled that the appellant was not entitled to share in the estate of the decedent.

The order appealed from is affirmed.

Angellotti, J., Henshaw, J., and Melvin, J., concurred.

SHAW, J., dissenting.—I dissent. In my opinion the true principles governing the construction and application of statutes providing for the adoption of children is that the natural relation and the laws governing it, are thereby altered and affected only so far as the statute of adoption by its terms declares or provides, either expressly or by necessary implication, and no farther. Like an invading force upon a hostile domain, it prevails and controls only so far as its lines extend. Beyond those limits all remain under the original control.

The Newman case (75 Cal. 213, [16 Pac. 887]), declaring that an adopted child inherits from the adopting parent, the Johnson case (98 Cal. 536, [21 L. R. A. 380, 33 Pac. 460]),

holding that such child is entitled, as an heir, to administer on the adopting parent's estate, and the Winchester case (140 Cal. 468, [77 Pac. 10]), that the child's share is exempt from inheritance to the same extent as that of a natural child, all depending on the same principle of heirship, go to the extreme verge of the invading force of the adoption statute. The reason for these decisions is plain and is found in the statute itself. The descent is cast at the moment of death and the persons on whom the estate then falls are determined by their relationship or kinship to the decedent the instant before his death. The adoption makes the one, legally, a child and the other, legally, a parent, at the time of death. This establishes the *status* of legal kinship at that time and the results stated by these decisions necessarily follow. These cases, however, do not carry the effects of the adoption to a period after the death of the parent.

The whole purpose and object of the adoption statute is to create, artificially, the relation of parent and child, to provide a *status* controlling them for their joint lives. That relation cannot last longer than the lives of the two parties to it. When either dies, the relation ceases and there remains nothing upon which the statute under which it was created can operate. The relation has served its purpose and has terminated. It has not, as has the natural relation, blood connections through which it may continue to work after it has itself ceased to have a present existence. There is not in the adoption statute a word to the effect that, where the adoption has served its purpose by prevailing over the natural relation during the joint lives of the two parties and has ended by the death of one of them, it shall thereafter continue for any purpose, or that there is to be thereafter any legal or constructive kinship, or mutual rights of inheritance, between the adopted child and the natural kin of the deceased foster parent, or between the foster parent and the natural kin of the deceased child. So far as the statute goes and while the new *status* lasts, the natural relations are altered, removed, or suspended. But they are not utterly destroyed. The natural inclinations and affections must remain. The statute cannot destroy them. Beyond the limits of the changes effected by the adoption, and after it has terminated, the natural relations should prevail and control, since there are then, in that field, none other.

The result should be and would be that, after this termination of the mutual relation, the inheritance from the survivor, upon his subsequent death, will be controlled by the general law of descent and the natural relationship will prevail. There will be then no artificial relation existing to cause a different course of descent from that to the natural kin.

So far as unjust or inequitable consequences may properly affect the question, it seems to me that the doctrine of the prevailing opinion, including, as it does, the doctrine that the adoption completely and forever removes the adopted child from legal relationship to his blood kin and destroys the mutual relations and rights of each arising therefrom, practically transplanting him into another family, without his consent or wish, unless he happens to be over twelve years old, will cause many more undesirable consequences than the doctrine that the adoption does not affect conditions arising after death has terminated it. If the child is an infant when adopted and the foster parent should presently die, the natural parents would have no legal right to its custody. It would be a waif, a legal orphan. If it should, in after life, accumulate property, and thereupon die without issue or wife surviving, the property would not go to its own kin, but to the family of the long since deceased foster parent. The children of such child would bear no legal relationship to their blood kin, but would belong to the family of the foster parent and would, presumably, inherit from the collateral relatives of that family. The consequences cannot all be foreseen, but these I have mentioned suggest that much confusion and injustice will arise from the rule announced by the court.

LORIGAN, J.—I concur in the views expressed by Justice Shaw in the foregoing dissenting opinion.

[S. F. No. 6210. In Bank.—December 10, 1912.]

M. P. SCOTT, Petitioner, v. **THOMAS F. BOYLE**, as Auditor of the City and County of San Francisco, Respondent.

PUBLIC OFFICERS—FIXED COMPENSATION—MANDAMUS TO COMPEL ISSUANCE OF WARRANT FOR SALARY.—*Mandamus* is an appropriate remedy to compel an auditing officer to issue a warrant for the compensation of the employees or officers of a city, county, or state, where the amount thereof is so fixed by law, ordinance, or otherwise that the act of auditing the same and drawing a warrant accordingly is merely ministerial in character.

ID.—SUPREME COURT—ORIGINAL JURISDICTION IN MANDAMUS—APPEAL INVOLVING SAME QUESTIONS.—The supreme court has original jurisdiction of such cases, and the fact that the same questions are involved in an appeal which has been taken thereto has no bearing upon the question of jurisdiction.

ID.—SEALERS OF WEIGHTS AND MEASURES—CONSTITUTIONALTY OF ACT OF MARCH 18, 1911—APPOINTMENT BY CITIES AND COUNTIES.—Prior to its amendment on October 10, 1911, section 14 of article XI of the constitution, providing that "no state office shall be continued or created in any county, city, town, or other municipality, for the inspection, measurement, or graduation of any merchandise, manufacture, or commodity; but such county, city, town, or municipality may, when authorized by general law, appoint such officers," empowered the legislature to enact the statute of March 18, 1911 (Stats. 1911, p. 384), authorizing the respective counties and municipalities of the state to appoint sealers of weights and measures, having the duties provided by that act.

ID.—RIGHT OF MUNICIPALITY TO MAKE APPOINTMENT UNDER POLICE POWER.—If such statute were unauthorized by that provision of the constitution, still an ordinance of a municipality authorizing the appointment of a sealer of weights and measures, and his deputies, and fixing their compensation, would be valid as an exercise of the police power conferred on municipalities and counties by section 11 of article XI of the constitution.

ID.—AMENDMENT OF SECTION 14 OF ARTICLE XI OF CONSTITUTION—STATUTE NOT REPEALED.—Such statute is not inconsistent with, and was not repealed or rendered inoperative by, the amendment of October 10, 1911, of section 14 of article XI of the constitution, providing that the legislature may by general and uniform laws provide for the inspection, measurement, and graduation of merchandise and manufactured articles and commodities, and may pro-

vide for the appointment of such officers as may be necessary for such inspection, measurement, and graduation.

ID.—MUNICIPALITIES STILL HAVE RIGHT TO APPOINT UNDER POLICE POWER.—The amendment of section 14 of article XI of the constitution does not purport to repeal section 11 of the same article, and is not inconsistent therewith, and counties and municipalities would have and still have the power to enact such an ordinance, under said section 11, in the absence of a general law inconsistent with its exercise by them.

ID.—ABSENCE OF STATE SYSTEM REGULATING SEALERS OF WEIGHTS AND MEASURES.—That amendment does not prescribe any special method for the exercise by the legislature of the power expressly mentioned, and it may now, under the general power granted by section 1 of article IV of the constitution, and also under the power specially described in the amended section, provide either a state system for such purpose, administered by state officers, or a local system administered by the respective counties, cities, or cities and counties, through officers which they may appoint under the authority of the general statute. There being no statute providing such state system, the act of March 18, 1911, remains in force as fully as if the amendment had not been made, and until the repeal of such act, or the establishment of a state system, the provisions of the act prevail and the officers appointed under it are *de jure* officers.

ID.—MUNICIPALITY MAY FIX COMPENSATION OF SEALER.—The provision of section 5 of article XI of the constitution, requiring the legislature to regulate and fix the compensation of county officers in proportion to duties, does not apply to officers created by the legislature, under said section 14, to exercise a part of the police powers of the state, which the provisions of that latter section, both in its original form and as amended, recognize as something distinct from the general political functions of counties and cities, and the general scheme of county or municipal government.

ID.—ACT IS UNIFORM IN OPERATION AND NOT SPECIAL LAW.—The act of March 18, 1911, applies throughout the state to all the counties, cities and municipalities thereof, and is therefore uniform in its operation. The fact that it is not made compulsory upon the respective counties and municipalities to appoint such sealers does not render it lacking in the uniformity necessary to a compliance with section 11 of article I of the constitution, nor make it a special law within the meaning of subdivisions 9, 28, and 29 of section 25 of article IV.

ID.—ORDINANCE MAY AUTHORIZE MAYOR TO APPOINT SEALER.—An ordinance of a municipality authorizing the mayor, as the executive officer of the city, to appoint the sealer, is an appropriate method of carrying into effect the provision of the statute that the sealer may be appointed by the municipality.

APPLICATION for a Writ of Mandate directed to the auditor of the City and County of San Francisco.

The facts are stated in the opinion of the court.

John L. McNab, for Petitioner.

Edward F. Moran, for Respondent.

SHAW, J.—This is an original proceeding in *mandamus* in this court to compel the defendant, as auditor, to draw a warrant in favor of the plaintiff for the amount due him on his salary as deputy sealer of weights and measures of the city and county of San Francisco. The auditor claims that no such office exists and that the plaintiff's appointment thereto is void.

Mandamus is an appropriate remedy to compel an auditing officer to issue a warrant for the compensation of the employees or officers of a city, county, or state, where the amount thereof is so fixed by law, ordinance, or otherwise that the act of auditing the same and drawing a warrant accordingly is merely ministerial in character. (*Fowler v. Peirce*, 2 Cal. 167; *People v. Whitman*, 6 Cal. 659; *McCauley v. Brooks*, 16 Cal. 46, 63; *Carroll v. Seibenthaler*, 37 Cal. 195; *Lawrence v. Booth*, 46 Cal. 189; *Kelso v. Trole*, 106 Cal. 477, [39 Pac. 948]; *Bannerman v. Boyle*, 160 Cal. 203, [116 Pac. 732].) This court has original jurisdiction of such cases. The fact that the same questions are involved in an appeal which has been taken in this court has no bearing upon the question of jurisdiction.

The office in question appears to have been created by and under the act of March 18, 1911. (Stats. 1911, p. 384.) This act adopts the United States' standards of weights and measures as the standards of this state, and provides that duplicates thereof shall be kept in the office of the secretary of state. Section 4 authorizes the respective counties and municipalities of the state to appoint sealers of weights and measures. Section 5 declares that the jurisdiction of such sealers shall extend over the limits of the particular county, except the part within the municipalities that have appointed or may appoint sealers under the act, and that the jurisdiction of such munici-

pal sealers shall extend throughout such city, or city and county, and that the particular city or county shall also have power to provide deputies for such sealer and fix the compensation of the sealer and his deputies. The sealers are required to keep duplicates of the standard weights and measures and to see that all weights and measures used by dealers or kept for sale within such territory accurately correspond with such standards. Every sealer shall twice each year inspect and test the weights and measures kept or used within his jurisdiction. Penalties are provided for the use or sale of false or inaccurate weights, or measures.

On August 29, 1911, the city and county of San Francisco duly adopted an ordinance, under this act, providing that the mayor should appoint a sealer of weights and measures and that such sealer might appoint, with the approval of the board of supervisors, a chief deputy and such additional deputies as should be required to properly perform the duties of the office, such additional deputies each to receive an annual salary of fifteen hundred dollars in monthly installments. A sealer was duly appointed, and on November 22, 1911, he, with the approval of the supervisors, appointed the plaintiff herein a deputy sealer. He immediately entered upon and has ever since continued the discharge of the duties of said office. The claim is that this statute and the ordinance of the city in pursuance thereof are in conflict with the constitution.

At the time said act was passed the constitution provided that "No state office shall be continued or created in any county, city, town, or other municipality, for the inspection, measurement, or graduation of any merchandise, manufacture, or commodity; but such county, city, town, or municipality may, when authorized by general law, appoint such officers." (Art. XI, sec. 14.)

Conceding that this language applies to such an office as a sealer of weights and measures having the duties provided by this act, the statute seems to be clearly within the power to authorize by general law the appointment of such officers, which this section expressly confers.

We think the language of section 14 embraces the subject matter of the act, but if it did not, the ordinance would be clearly valid as an exercise of the police power conferred on municipalities and counties by section 11 of said article: "Any

county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

The principal contention of the defendant is, however, that although the statute and the ordinance may have been valid at the time each respectively was adopted, they were both repealed, or ceased to exist as valid provisions of law (art. XXII, sec. 1) upon the adoption on October 10, 1911, of an amended section 14 of article XI of the constitution. This is as follows:

"The legislature may by general and uniform laws provide for the inspection, measurement and graduation of merchandise and manufactured articles and commodities, and may provide for the appointment of such officers as may be necessary for such inspection, measurement and graduation."

We perceive nothing in this section that is inconsistent with the aforesaid statute, nor anything that evinces an intention to repeal or extinguish it. It does, indeed, remove the previous prohibition taking from the legislature the power, which it would otherwise have had under section 1 of article IV, to establish state offices for such purposes. It also omits the special authorization to counties and municipalities to do so when authorized by general laws. But counties and municipalities undoubtedly would have and still have this power, under section 11 aforesaid, in the absence of a general law inconsistent with its exercise by them. The amended section 14 does not purport to repeal section 11 and it is not inconsistent therewith. Neither does it prescribe any special method for the exercise by the legislature of the power expressly mentioned, the power to "provide for the appointment of such officers as may be necessary for such inspection, measurement and graduation." The former prohibition against the creation of state officers for that purpose being removed by the amendment, the legislature may now, under the general power granted by section 1 of article IV, and also under the power specially described in said amended section 14, provide either a state system for such purpose, administered by state officers, or a local system administered by the respective counties, cities, or cities and counties, through officers which they may appoint under the authority of the general statute. The statute therefore remains in force as fully as if the amendment

had not been made. There is no statute providing such state system and we are therefore not called upon to determine what effect such a statute might have upon a previously established local system. We need only say that until there is a state system in force, or until the repeal of the act of 1911, the provisions of the latter prevail and the officers appointed under it are *de jure* officers.

It is further suggested that they are county officers, that section 5 of article XI provides that the legislature shall regulate the compensation of all such officers in proportion to duties and, consequently, that it cannot delegate to the board of supervisors of a county or city and county the duty of fixing the salaries of such officers instead of doing so itself. It is true that the general principle is that when the people by their constitution impose an express duty of this kind on the legislature, that body cannot, in general, delegate such duty to any subordinate body. (*Dougherty v. Austin*, 94 Cal. 601, [16 L. R. A. 161, 28 Pac. 834, 29 Pac. 1092].) That case decided that said section 5 confided to the legislature itself the duty to regulate and fix the compensation of county officers and that it could not delegate this duty, or any part of it, to a county board of supervisors. We are of the opinion that the provision of that section requiring the legislature to regulate the compensation of the officers referred to therein does not apply to offices created by the legislature, under said section 14, to exercise a part of the police powers of the state which the provisions of the latter section, both in its original form and as amended, recognize as something distinct from the general political functions of counties and cities and the general scheme of county or municipal government.

The act applies throughout the state to all the counties, cities and municipalities thereof. It is therefore uniform in its operation. The fact that it does not make it compulsory upon the respective counties and municipalities to appoint such sealers does not render it lacking in the uniformity necessary to a compliance with section 11 of article I of the constitution, nor make it a special law within the meaning of subdivisions 9, 28, and 29 of section 25, of article IV.

We see no force in the point that the ordinance is void because it vests in the mayor the power of appointing the sealer. Such appointment is in its nature an executive act. Confer-

ring it upon the mayor is not a delegation to him of the legislative power of the board of supervisors. The act provides that the sealer may be appointed by the city and county. An appropriate method of accomplishing this is that here followed,—namely, by an ordinance authorizing the mayor to do so. He is the executive officer of the city and county.

Let the writ issue as prayed for.

Angellotti, J., Lorigan, J., Melvin, J., Henshaw, J., and Sloss, J., concurred.

[S. F. No. 5831. In Bank.—December 11, 1912.]

THE AMERICAN LAW BOOK COMPANY, Petitioner v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA et al., Respondents.

JUSTICE'S COURT—INSUFFICIENT SERVICE OF SUMMONS—JUDGMENT BY DEFAULT AGAINST FOREIGN CORPORATION—AFFIRMANCE ON APPEAL—CERTIORARI.—A foreign corporation, against whom a judgment by default had been rendered in a justice's court, on an alleged insufficient substituted service of summons on the secretary of state, by appealing to the superior court submitted the question of the want of jurisdiction of the justice's court of its person to the superior court, and the latter court had the power to decide that question incorrectly as well as correctly. After its affirmance by the superior court, the judgment of the justice's court is no longer subject to review on *certiorari*. An attack in such a proceeding must be confined to the jurisdiction of the superior court over the person of the petitioner.

Id.—SUPERIOR COURT ACQUIRES JURISDICTION OF PERSON OF APPELLANT—POWER TO HEAR AND DETERMINE APPEAL.—An appeal to the superior court, although not the exclusive remedy, is one method and an appropriate manner of attacking the jurisdiction of the justice's court, and such defendant, by appealing to the superior court from the judgment of the justice's court, submitted its person to the jurisdiction of the superior court, and cannot afterward by *certiorari* question the power of that court to hear and determine the appeal.

APPLICATION for a Writ of Certiorari directed to the Superior Court of Santa Clara County and John E. Richards, Judge.

The facts are stated in the opinion of the court.

H. C. Schaertzer, for Petitioner.

R. C. McComish, and Will M. Beggs, for Respondents.

MELVIN, J.—A writ of *certiorari* was issued by this court directed to the superior court of Santa Clara County, requiring that court to certify a transcript of the proceedings and records in the case of E. V. Burke v. The American Law Book Company. That case was appealed from the justice's court of San Jose Township. It was an action for damages for breach of contract, the sum demanded being \$299, and in a second count for money had and received the same amount was also prayed for. Summons was issued and was duly signed by John T. Wallace, justice of the peace of said San Jose Township, and to said summons there was attached a certificate of the county clerk of Santa Clara County, under seal, duly setting forth the qualifications of said Wallace as a justice of the peace. The summons was served by the delivery of a copy thereof with a copy of the complaint thereto attached, to the secretary of state, but the return to this writ shows that the copy of the clerk's certificate to the official character of the justice of the peace had no seal indicated thereon. The return of the sheriff of the county of Sacramento certified that The American Law Book Company was a foreign corporation doing business in the state of California, and that said corporation had not designated any resident of this state as a person upon whom process might be served. Thirty days after the service of summons as shown by the return above described, the justice of the peace entered judgment for \$299 in favor of plaintiff, as defendant had made no appearance. Fifteen days following the entry of said judgment defendant appealed to the superior court. It does not appear either from the petition or the return whether this appeal was formally upon questions of both law and fact, but the record does show that petitioner's attorney declared at the hearing in the superior court, in answer to a

question by the judge, that it was taken upon questions of law alone. At this hearing the appellant offered certain oral and documentary evidence which, under stipulation, was admitted by the court, subject to a future ruling, but the court thereafter made no ruling on the admissibility of this evidence, which consisted of (1) a copy of the summons, complaint and certificate served upon the secretary of state, showing the absence of a seal from the said certificate; (2) the testimony of the officer who served the summons on the secretary of state, that his knowledge of defendant's failure to designate a resident agent to receive service of process in California was based upon his examination of the records in the office of the secretary of state; and (3) testimony of an employee of the corporation defendant that the company's method of doing business was to take orders in California for books and to send such orders for approval to defendant's office in New York, and that upon approval of the orders the books were sent by freight or express directly to the purchasers. Upon this showing the superior court affirmed the judgment, but a partial satisfaction having been made a new judgment for two hundred and seventy dollars was entered.

Petitioner contends that the superior court never obtained jurisdiction over its person because the judgment in the justice's court was a nullity. The contention is that the sheriff's return to the summons declaring the defendant to be a "foreign corporation doing business in this state" was insufficient as a conclusion and as a statement not based upon positive knowledge; that the service was void by reason of the absence of a description of the seal from the copy of the clerk's certificate; that the evidence in the justice's court was not sufficient to show the failure of the defendant to designate a resident Californian upon whom process might be served; and that sections 405 and 410 of the Civil Code are unconstitutional as applied to this petitioner. It will be seen that many of these objections are to the jurisdiction not of the superior court but of the justice's court. This attack must be confined to the jurisdiction of the superior court over the person of the petitioner. One method of attacking the jurisdiction of the justice's court is by appeal to the superior court. (*Tucker v. Justices' Court*, 120 Cal. 514, [52 Pac. 808].)

After such appeal, no further attack may be made upon the judgment given in the justice's court. As was said in *Olcese v. Justice's Court*, 156 Cal. 86, [103 Pac. 318]: "This court has never recognized the right of a petitioner to writ of *certiorari* to review the judgment of a justice's court after appeal taken and determined in the superior court." Respondent contends, and we think correctly, that by its appeal to the superior court the petitioner submitted the question of want of jurisdiction of its person to the superior court and that the tribunal to which the appeal was thus prosecuted had the right to decide that question incorrectly as well as correctly. This court said in the opinion in the *Matter of Hughes*, 159 Cal. 363, [113 Pac. 686]: "The supreme court has jurisdiction in *certiorari* to review a judgment of the superior court only in a case where that court has exceeded its jurisdiction (Code Civ. Proc., sec. 1068), and in such cases only for the purpose of inquiring whether or not the judgment sought to be reviewed was in excess of jurisdiction, or as the code expresses it, 'the review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer.' (Code Civ. Proc., sec. 1074.) If such tribunal has regularly pursued its authority, our inquiry stops. We cannot consider or correct errors of law committed by the inferior court in the exercise of its authority on the merits of the cause it has jurisdiction to entertain and decide. No matter how erroneous that decision may be, even on the face of the record, we have no power to change, annul, or reverse it in this proceeding, if that court had jurisdiction to act in the matter before it." But petitioner insists that it only appeared for the purpose of questioning the jurisdiction of the justice's court; that it never submitted itself generally to the superior court, and that the method followed by it was the only one available. Undoubtedly an appeal to the superior court is one method and an appropriate manner of attacking the jurisdiction of the justice's court. (*Tucker v. Justices' Court*, 120 Cal. 514, [52 Pac. 808].) But it is not exclusive. For example, it does not appear that petitioner had no opportunity to make a motion to set aside the default. When such a motion has been denied erroneously the moving party may by a writ of prohibition restrain the enforcement of the judg-

ment. In *Sanborn v. Superior Court*, 60 Cal. 425, the application was for a writ of prohibition. Petitioner, who was defendant in the action in the justice's court, after unsuccessfully combatting the jurisdiction of that court, took an appeal to the superior court. The supreme court characterized as "novel and singular" the action of a party appealing in asking that the court should be restrained from trying the appeal which he was prosecuting. In *Armantage v. Superior Court*, 1 Cal. App. 130, [81 Pac. 1033], the justice's court had lost jurisdiction through the improper service of the notice of trial. An appeal was taken and judgment was rendered, after trial, against appellant. There, as here, it was contended that the superior court had no jurisdiction on the appeal to do anything except reverse the judgment and order the case back to the justice's court as appellant demanded, but the district court said: "Let it be conceded, without deciding the question, that, under the statute as heretofore construed by the supreme court, the superior court should have sustained the objection of the appellant to trying the case and should have granted his request to reverse the judgment of the justice and send the case back; yet the refusal was only error. If these objections had not been made, or if the appellant had failed entirely to appear after his appeal was perfected, and a trial, after the five days' notice, had been had in his absence in the superior court, there could have been no question as to the validity of the judgment following such trial. The court had the same *jurisdiction* to overrule appellant's objections that it had to sustain them, or to proceed to judgment in the appellant's absence. Jurisdiction is the power to decide—wrong, as well as right." A rehearing of this case was denied by the supreme court. In other states there is abundant authority for the rule above announced. In *Fee v. Big Sand Iron Co.*, 13 Ohio St. 563, judgment by default had been entered in the court of common pleas. Defendant appeared, however, and gave notice of appeal. This was held a submission to the jurisdiction of the court. The above cited case has been followed in many jurisdictions. The following cases are also authority for the same rule: *K. C. S. & Memphis R. R. v. Summers*, 45 Ark. 296; *Briggs v. Humphrey*, 1 Allen (Mass.) 372; *McCubrey v. Lankis*, 74 Minn. 302, [77 N. W. 144]; *Gant v. Chicago etc. Ry. Co.*, 79 Mo. 503; *Gage v. Maryatt*, 9 Mont.

266, [23 Pac. 337]; *Perry v. McKinzie*, 4 Tex. 155; *Ruthe v. Green Bay etc. Co.*, 37 Wis. 346; *Standley v. Arnou*, 13 Fla. 368; *St. Louis etc. Ry. Co. v. McBride*, 141 U. S. 130, [35 L. Ed. 659, 11 Sup. Ct. Rep. 982].

Petitioner having submitted its person to the jurisdiction of the superior court cannot now by *certiorari* question the power of that court to hear and determine the appeal from the justice's court.

It follows that the writ must be discharged and it is so ordered.

Henshaw, J., Lorigan, J., Angellotti, J., Shaw, J., and Sloss, J., concurred.

Rehearing denied.

[L. A. No. 2949. Department One.—December 12, 1912.]

THOMAS F. COOKE, Respondent, v. JOSEPH MESMER,
Appellant.

PLEDGE OF ACCOMMODATION NOTES—LIMITATION ON LIABILITY OF MAKERS
—NOTICE TO BANK AS PLEDGEE—KNOWLEDGE PREVIOUSLY ACQUIRED
BY PRESIDENT OF BANK—FORGETFULNESS AT TIME OF PLEDGE.—A
bank which becomes the pledgee of certain accommodation promissory notes that were executed by the makers for the purpose of being used by the payees as collateral security for a particular loan, under a general understanding between the payees and the makers that they should not be used in such a way as to render the makers liable thereon beyond a certain proportion of their amount, is not charged with notice of the purpose for which the notes were to be used, or of the limit of liability thereon, by reason of the knowledge of such facts acquired at the time of the execution of the notes by a person who afterward became the president of the bank, and was such at the time the notes were taken by it as collateral security, unless such knowledge was present in the mind of the president at the time the notes were pledged.

Id.—NOTICE—KNOWLEDGE ACQUIRED BY AGENT PRIOR TO AGENCY—
NOTICE TO PRINCIPAL.—While the decided weight of authority is in favor of the rule that knowledge possessed by an agent while he occupies that relation and is executing the authority conferred upon

him, as to matters within the scope of his authority, is notice to his principal, although such knowledge may have been acquired before the agency was created, it is universally recognized that this rule is subject to the qualification that knowledge acquired by an agent before the commencement of the agency is not notice to the principal unless it is shown or appears that knowledge was present in his mind at the time he acted for the principal.

GUARANTY—PAYMENT OF NOTES—ABSOLUTE AND UNCONDITIONAL GUARANTY.—Under a guaranty of the payment of promissory notes, “with all costs of collection, including reasonable attorneys’ fees,” the latter words are words of extension rather than of limitation, and in no degree imply that the guaranty was to be effective only in the event that the holder of the note was unable to collect from the maker. Such a guaranty is an absolute and unconditional guaranty of payment of the notes.

ID.—ACTION ON GUARANTY—INDEPENDENT CONTRACT.—An action on such a guaranty is one upon an independent contract of the guarantor, with which the principal debtor has nothing to do.

ID.—PLEDGE OF NOTES AFTER MATURITY—ABSENCE OF NOTICE BY PLEDGEE—GUARANTY OF PAYMENT—ESTOPPEL OF GUARANTORS TO LIMIT LIABILITY OF MAKERS.—Where such notes were pledged to the bank after maturity, and were taken by it without notice of any fact not appearing on their face, on the faith of a representation by the payees of their enforceability against the makers to the full amount apparently due thereon, and at the time of the pledge their payment in full accord with their terms was absolutely and unconditionally guaranteed by the payees, the latter, in an action against them to enforce the guaranty, are estopped from asserting any defense tending to reduce the apparent liability on the part of the makers, and as guarantors are liable for the full amount of the notes.

ID.—OBLIGATION OF GUARANTORS NOT LIMITED BY EXTENT OF OBLIGATION OF MAKERS.—Under such circumstances, section 2809 of the Civil Code, providing that “the obligation of a guarantor must be neither larger in amount nor in other respects more burdensome than that of the principal, and if in its terms it exceeds it, it is reducible in proportion to the principal obligation,” is inapplicable to relieve the guarantors from the necessity of paying anything on their guaranty that the makers could not be compelled to pay on their notes.

ID.—CONSIDERATION OF GUARANTY—LOAN TO PRINCIPAL OF GUARANTOR.—The loan of money to a principal is sufficient consideration to support a contract by his agent guaranteeing the payment of notes pledged to secure the loan.

ID.—GUARANTY NOT MERELY OF COLLECTION—NOTES PAST DUE WHEN PLEDGED.—The fact that such notes were past due when pledged to the bank does not compel the construction that such guaranty was

one merely of collection, rather than an absolute and unconditional guaranty of payment.

ID.—GUARANTY INDORSED ON NOTE—TIME OF PLEDGE DEEMED TIME OF MAKING GUARANTY.—Where a promissory note, bearing on its back an indorsement guaranteeing its payment by the parties named therein as payees, is pledged with a bank as collateral security, the guaranty, so far as the pledgee is concerned, must be deemed to have been made when the note was delivered to it.

ID.—EFFORT TO COLLECT FROM MAKERS OF NOTE NOT ESSENTIAL.—If such guaranty was an absolute and unconditional guaranty of payment, no effort to collect from the makers was essential as a prerequisite to liability on the part of the guarantors.

ID.—GUARANTY OF COSTS OF COLLECTING NOTE AND ATTORNEYS' FEES—ATTORNEYS' FEES IN ACTION ON GUARANTY NOT INCLUDED.—Under a guaranty reading "I guarantee the payment of this note, with all costs of collection, including reasonable attorneys fees," the attorneys' fees therein referred to are only such as may be expended in attempting to collect the note, and do not include any fee that may be paid in a suit on the guaranty.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Frederick W. Houser, Judge.

The facts are stated in the opinion of the court.

D. K. Trask, Trask, Norton & Brown, H. Gerald Chapin, and Albert M. Norton, for Appellant.

Miller & Miller, D. Z. Gardner, and J. W. McKinley, for Respondent.

ANGELLOTTI, J.—This is an action by the assignee of the Traders Bank of Los Angeles against Joseph Mesmer and Winfield Scott as the guarantors of thirty-six promissory notes executed by as many different persons and payable to said defendants, which had been deposited with said bank by the payees as security for money loaned by said bank to the Los Angeles Press, a corporation. The action was to recover of said guarantors so much of the amount due on said notes, according to the terms thereof, as would discharge the obligation of said Los Angeles Press to the bank. Defendant Scott defaulted, and the findings were in favor of plaintiff as against Mesmer for the full amount claimed. Judgment was given

in favor of plaintiff against both defendants for such amount. This is an appeal by Mesmer from said judgment and from an order denying his motion for a new trial.

There is no question in the case as to the correctness of the claim of plaintiff's assignor against the Los Angeles Press. The claim was evidenced by certain promissory notes executed by said Los Angeles Press to said Traders Bank for money loaned. The first of these notes was one for ten thousand dollars, payable one day after date, given and dated October 19, 1908, being for ten thousand dollars loaned on that date. It was signed by said Los Angeles Press by defendant Mesmer as president of such corporation and by the secretary thereof. It was in the usual printed form in general use among banks, and contained in the printed form the words "And I hereby deposit or pledge as collateral security for the payment of this note or any other liability, present or future, to the Traders Bank of Los Angeles," followed by the written words in a space left for insertion "thirty-nine notes of a total of forty thousand dollars." Other notes were subsequently given to the bank by the Los Angeles Press for money loaned, one of five thousand dollars on October 19, 1908; one of two thousand dollars on July 19, 1909; one of four hundred dollars on July 29, 1909, and one of five hundred dollars on April 19, 1909. No mention was made of security in any of these subsequent notes. All of these notes were due at the time this action was commenced, and the aggregate amount due thereon according to their terms at the time of judgment was \$21,156.15, for which sum, together with one thousand dollars attorney fees, judgment was given.

It is not disputed that at the time of the giving of the ten thousand dollar note to the Traders Bank, Mesmer, who negotiated the loan on behalf of the Los Angeles Press, delivered to the bank as security the thirty-nine notes referred to. It is claimed by Mesmer that they were delivered only as security for the payment of the ten thousand dollar note, and cannot be considered security for the payment of any of the other notes. These thirty-nine notes, with the exception of one which was for two thousand dollars, were for one thousand dollars each. With the exception that the maker in each case was a different person and that the notes were dated variously from July 8, 1908, to September 28, 1908, the notes were

identical in form. The payees named in each note were Joseph Mesmer and Winfield Scott, and the notes were all payable one day after date. The following, being a copy of the note of J. Harvey McCarthy, will serve as a sample of all:

“1000.00

Los Angeles, Cal, July 11, 1908.

“One day after date, for value received, I promise to pay to the order of Joseph Mesmer and Winfield Scott, at Merchants National Bank of Los Angeles, the sum of One Thousand Dollars, without interest. I further agree to pay a reasonable amount as attorney’s fees and to pay costs of suit in case suit is brought on this note to compel payment thereof.

“J. HARVEY MCCARTHY.”

At the time these notes were delivered to the Traders Bank by Mesmer, each bore on its back the following indorsement,—namely:

“For value received, I guarantee the payment of this note, with all costs of collection, including reasonable attorney’s fees, and authorize extension of time to maker, and same shall not affect my liability. Demand, notice of nonpayment and protest waived.

“JOSEPH MESMER.

“WINFIELD, SCOTT.”

Three of these one thousand dollar notes,—namely, those of Carl Leonardt, J. Myrick, Jr., and C. A. Canfield, were subsequently, at Mesmer’s request, redelivered to him by the bank, two hundred and fifty dollars being paid on the indebtedness of the Los Angeles Press to the bank on the withdrawal of each of said notes.

This action is on the guaranty on the remaining thirty-six notes.

The thirty-nine notes were in fact given by the makers to Mesmer and Scott solely for the purpose of being used as collateral security for the payment of money to be borrowed for and on account of the Los Angeles Press, which was to publish a newspaper in Los Angeles to be known as the *Evening News*. It may be conceded that it was the general understanding between Mesmer and Scott on the one hand, and each of the makers on the other that such notes should not be used in such a way as to render any maker liable for a sum in excess of one-fourth of the amount of his note with interest. After the delivery of the notes to Mesmer and Scott, writings were signed

by each of the makers purporting to authorize said payees to pledge the same to the Merchants National Bank, as security for the payment of two notes, one for one thousand two hundred and fifty dollars and one for eight thousand seven hundred and fifty dollars. No other written authorization to pledge was ever signed by said makers. The Merchants National Bank notes were taken up with the money loaned by the Traders Bank, and the collateral security notes having been redelivered to Mesmer and Scott, the same were delivered by them to the Traders Bank as already stated.

The Traders Bank had no notice of any of the circumstances under which the thirty-nine notes had been given to Mesmer and Scott, or of any understanding between them and the makers, as to the purpose for which they were to be used or the limit of liability thereon, except such notice or knowledge as must be imputed to it by reason of the knowledge of Phillip L. Wilson, its president at the time the loans were made and the notes taken as collateral security. Wilson was the maker of one of the one thousand dollar notes. His note was dated July 11, 1908, and he had signed the written authorization to pledge the notes to the Merchants National Bank for an aggregate indebtedness of ten thousand dollars, which was evidenced by notes given during September, 1908. The note given by Wilson was not, in fact, his own obligation. He had declined to personally take part in the matter, and gave the note as agent for an undisclosed party, who did not want to be known in the matter. Wilson was in no way connected with the Traders Bank at the time of the giving of his one thousand dollar note or at the time of the signing of the written authorization to pledge the notes to the Merchants National Bank. The court expressly found that the Traders Bank had no notice or knowledge of any of the circumstances we have referred to. It further found that while Wilson was the president of the Traders Bank and the official of said bank who had authority to and who did represent said bank in said loan transactions, he was in no way connected with said bank at the time of signing his note, and that he never communicated any knowledge that he possessed in regard to the matter to the Traders Bank "and that at the time of the transactions with respect to the making of the loans by said Traders

Bank to the said Los Angeles Press, set out in the amended complaint, said Wilson had forgotten and did not have in his mind any knowledge or memory of the aforesaid agreement whereby each of the makers of said promissory notes was liable for and was to pay only twenty-five per cent of the principal sum expressed on the face thereof." The portion of the finding that we have quoted is earnestly assailed by learned counsel for Mesmer as not being sustained by the evidence. While the evidence on this point is of such a nature that we would not feel warranted in saying that a different conclusion on the part of the trial court would not have been held by us to have been sufficiently supported by the evidence, or even that we might not have come to a different conclusion ourselves were the question presented to us as triers of the facts, we are satisfied that it cannot properly be held as matter of law that the conclusion of the trial court has not sufficient support in the evidence. The testimony of Wilson himself as to absence of knowledge or memory on his part is clear and positive, and there are some circumstances disclosed by the evidence that tend to corroborate this testimony. It cannot be said that it is impossible in the nature of things that he should have altogether forgotten the conversations between himself and Mesmer and Scott as to any limitation of liability on the note signed by him as agent for an undisclosed principal, as well as the writing expressly authorizing the pledging of the notes to the Merchants National Bank, a writing which by the way, did not in terms expressly purport to limit the authority of Mesmer and Scott to otherwise pledge the same. We have in this matter the usual case of mere conflict in evidence, where the appellate court under its well settled rule is not authorized to interfere with the determination of the trial court.

In view of what we have said on this point, it is clear that the finding that the Traders Bank had no notice or knowledge of any of these circumstances is sustained by the evidence. While the decided weight of authority is in favor of the rule that knowledge *possessed* by an agent while he occupies that relation and is executing the authority conferred upon him, as to matters within the scope of his authority, is notice to his principal, *although such knowledge may have been acquired before the agency was created*, it is universally recognized

that this rule is subject to the qualification that "knowledge acquired by an agent before the commencement of the agency is not notice to the principal unless it is shown or appears that knowledge was present in his mind at the time he acted for the principal." (1 Clark & Skyles on Agency, sec. 482.) In *Christie v. Sherwood*, 113 Cal. 526, [45 Pac. 820], in discussing the question whether knowledge acquired by the cashier of a bank while he was acting as agent for another was notice to the bank in a subsequent transaction, this court said: "but whether it is notice to the bank depends upon whether the previous transaction was present in his mind at the time the loan was made by the bank." (See, also, *Wittenbrock v. Parker*, 102 Cal. 93, 102, 103, [41 Am. St. Rep. 172, 24 L. R. A. 197, 36 Pac. 374].) It being conceded that the only notice to the bank was such as it must be held to have had in view of the knowledge of its agent, Wilson, it is thus seen that, in view of the finding as to the lack of knowledge and memory on Wilson's part at the time of the transactions with the Los Angeles Press, it must be held that the finding as to lack of knowledge or notice on the part of the bank is fully sustained by the evidence.

There can be no doubt that the findings substantially to the effect that the thirty-nine notes were pledged as collateral security for not only the ten thousand dollar loan to the Los Angeles Press, but also for all the subsequent loans to that corporation, and that such subsequent loans were made by the Traders Bank on the faith of such pledge, are sufficiently sustained by evidence.

The thirty-nine notes were all notes payable one day after their date and were pledged to the Traders Bank after maturity. It must be conceded that the bank therefore took them subject, so far as the makers were concerned, to any defenses which might have been successfully made by the makers against the payees, Mesmer and Scott. We may concede solely for the purposes of this decision that by reason of the circumstances attendant upon the giving of these notes to such payees, they could not enforce payment thereof against the makers for any sum in excess of one-fourth of the amount thereof, and that the same would be true as to any assignee or indorsee of such notes and as to any action brought against the makers thereof. But this is no such action. It is an ac-

tion against Mesmer and Scott on their absolute and unconditional guaranty, indorsed on the back of each note. We have already set forth a copy of this guaranty, and it is not necessary here to repeat it. Plainly, it is what we have just stated it, an absolute and unconditional guaranty of the payment of each note in full accord with its terms. The words "with all costs of collection, including reasonable attorneys fees" are words of extension rather than of limitation, and in no degree imply that the guaranty was to be effective only in the event that the plaintiff was unable to collect from the makers. It is thoroughly settled that an action on such a guaranty is one upon an independent contract of the guarantor, with which the principal debtor has nothing to do. The liability of the guarantor depends entirely upon the terms of his contract of guaranty, and "there is no privity, or mutuality, or joint liability between the principal debtor and his guarantor." (*Adams v. Wallace*, 119 Cal. 67, [51 Pac. 14]; see, also, *Kinsel v. Ballou*, 151 Cal. 762, [91 Pac. 620].) Such contract of guaranty in this case was made by the guarantors personally with the Traders Bank when they delivered the notes payable to themselves to the bank, with their guaranty written and signed on the back thereof, as security upon the terms and conditions stated in the ten thousand dollar note for the payment of said note "or any other liability, present or future, to the Traders Bank of Los Angeles." According to both allegations of the complaint and findings, sufficiently supported by the evidence, they personally negotiated the loan, knew the terms upon which said notes were to be deposited as security, as stated in the ten thousand dollar note, and deposited the pledged notes in accord with the understanding so expressed. The bank took them, as we have seen it must be held here, without notice of any fact not appearing on the face of the notes, and made its loans to the Los Angeles Press, relying thereon. Under such circumstances, the liability of the guarantors to the bank appears to be clear, whatever may be the fact as to the liability of the makers on the notes by virtue of any arrangement between themselves and the payees. We are not here concerned with the latter question. Learned counsel for Mesmer relies strongly on section 2809 of the Civil Code, which provides that "the obligation of a guarantor must be neither larger in amount nor in

other respects more burdensome than that of the principal, and if in its terms it exceeds it, it is reducible in proportion to the principal obligation," as relieving the guarantors here from the necessity of paying anything on their guaranty that the makers could not be compelled to pay on their notes. This section affords no protection to the guarantors under the circumstances of this case. The facts alleged and found sufficiently show a representation to the bank by Mesmer and Scott personally of the enforceability of the notes against the makers to the full amount apparently due thereon, going to the full extent of their guaranty, upon the faith of which the bank acted in making the loans to the Los Angeles Press; and, regardless of any other possible answer to the claim, upon well settled principles Mesmer and Scott are estopped from asserting in an action on their guaranty any defense tending to reduce the amount of such apparent liability on the part of the makers. While it is true that they were acting in a representative capacity in giving the note of the Los Angeles Press to the Traders Bank, they were clearly acting in their individual capacity in delivering over and allowing the pledging of their notes as collateral security for the loans. As said in *St. John v. Roberts*, 31 N. Y. 441, [88 Am. Dec. 287], in a somewhat similar case, "Such act of theirs was a representation of their liability on the note and they are now estopped in good faith and sound morals, from denying such liability." It certainly would be a most peculiar rule of law that would allow a payee of a note, who guarantees the payment of the same to another to whom he pledges it as security for another obligation, to interpose successfully as a defense when sued on his guaranty, some private understanding between himself and the maker of the note, of which the third party had no notice or knowledge. Although Mesmer and Scott did not personally receive the money loaned to the Los Angeles Press, there can be no question of the sufficiency of consideration for their undertaking of guaranty.

The thirty-nine notes had theretofore been pledged to the Merchants National Bank as security for loans made by that bank to Mesmer and Scott on notes executed by Scott. The obligations in favor of such bank were extinguished by payment with the aid of the money borrowed from the Traders Bank, and the pledged notes were thereupon released from

such pledge and returned to the payees named. It is urged that the payment of the Merchants National Bank notes extinguished the obligation of the makers of the thirty-nine notes, and, consequently, the obligation of the guarantors. What we have already said on the subject of estoppel is a sufficient answer to this claim.

We are satisfied that the fact that the thirty-nine notes were past due when pledged to the Traders Bank should not be held to force the construction that the guaranty was one merely of collection (see Civ. Code, sec. 2800), rather than an absolute and unconditional guaranty of payment. Under our statute, "a guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor." (Civ. Code, sec. 2806. See *Pierce v. Merrill*, 128 Cal. 464, 469, 470 [79 Am. St. Rep. 56, 61 Pac. 64].) So far as the Traders Bank is concerned the guaranty here must be deemed to have been made when the notes on which the same was indorsed were delivered by Mesmer and Scott to such bank. There is nothing in the terms of the guaranty, or in the facts and circumstances of the case to import any condition precedent to the liability of the guarantors. It is not disputed that if the guaranty was an absolute and unconditional guaranty of payment, no effort to collect from the makers was essential as a prerequisite to liability on the part of the guarantors. (See *Pierce v. Merrill*, 128 Cal. 464, [79 Am. St. Rep. 56, 61 Pac. 64]; *Adams v. Wallace*, 119 Cal. 67, [51 Pac. 14].)

We cannot say that the trial court abused the discretion committed to it by the law in denying the motion for a new trial, in so far as the same was based on the ground of the alleged newly discovered evidence of Mr. Price.

As we have said, the judgment awarded plaintiff, one thousand dollars, as and for attorneys' fees in this action on the guaranty. We are satisfied that this portion of the judgment cannot be upheld. It is based entirely, of course, on the language of the guaranty on each of the thirty-nine notes, "I guarantee the payment of this note, with all costs of collection, including reasonable attorneys fees." We are of the opinion that it should be held that the reasonable attorneys' fees therein referred to are such attorneys' fees as may be expended in attempting to collect the note, and do not in-

clude any fee that may be paid in a suit on the guaranty. The words "with all costs of collection" manifestly refer to the words "this note." As we have seen, this is in no sense an action on the notes or any attempt to collect the same.

There is no other matter requiring special mention. We find nothing in any of the points made warranting anything more at our hands than a modification of the judgment by eliminating therefrom the amount allowed for attorney fees.

The judgment is modified by striking therefrom the words "also the further sum of one thousand dollars as and for attorneys fees herein," and as so modified it is affirmed. The order denying the motion for a new trial is affirmed.

Sloss, J., and Shaw, J., concurred.

Hearing in Bank denied.

[Sac. No. 1938. Department One.—December 13, 1912.]

BEULAH WORK, Appellant, v. J. D. CAMPBELL,
Respondent.

DECEIT—FRAUDULENT REPRESENTATIONS TO WIFE CAUSING SEPARATION FROM HUSBAND.—Where the separation of a husband and wife was the result of her cruel treatment of him, and the sole cause of her conduct was the action of a third person in making to her willfully false representations concerning her husband, for the very purpose and with the design on his part to so influence her as to bring about such a separation, the wife may maintain an action against the person making the false representations to recover damages occasioned her as the result of the separation.

ID.—WHEN ACTION FOR DECEIT WILL LIE.—As a general rule, an action for damages for deceit will lie wherever a party has made a false representation of a material fact susceptible of knowledge, knowing it to be false or not having sufficient knowledge on the subject to warrant the representation, with the intent to induce the person to whom it is made, in reliance upon it, to do or refrain from doing something to his pecuniary hurt, when such person, acting with reasonable prudence, is thereby deceived and induced to so do or refrain, to his damage.

ID.—CONDUCT OF PLAINTIFF DIRECT CAUSE OF RESULT OCCASIONING DAMAGE.—It is no answer to such an action that the action or conduct of the plaintiff is the direct cause of the result occasioning damages. The whole basis of the action is that such act or conduct was fraudulently induced by the defendant.

ID.—CONDUCT VIOLATIVE OF GOOD MORALS OR PUBLIC POLICY.—Under the circumstances alleged in the complaint, it is held that the harsh and cruel conduct of the wife toward her husband, so fraudulently induced and causing their separation, was not so violative of good morals or public policy as to defeat her right to action.

ID.—HUSBAND NECESSARY PARTY PLAINTIFF—FAILURE TO JOIN—WAIVER OF NONJOINDER—DEMURRER.—Notwithstanding the complaint in such action shows upon its face that the plaintiff is a married woman and that she and her husband are not living separate and apart by reason of his desertion of her, and that the husband was a necessary party plaintiff, and that any damages recovered therein would be community property, the failure to join him as such a party is waived, unless objection to his nonjoinder is specially taken by demurrer.

APPEAL from a judgment of the Superior Court of Kings County. John G. Covert, Judge.

The facts are stated in the opinion of the court.

Dixon L. Phillips, and Robert W. Miller, for Appellant.

J. C. C. Russell, for Respondent.

ANGELLOTTI, J.—Defendant's demurrer to plaintiff's amended complaint having been sustained, and plaintiff having declined to amend, a judgment of dismissal was given. This is an appeal by plaintiff from such judgment.

The action is one to recover of defendant fifteen thousand dollars' damages alleged to have been caused plaintiff by reason of the fact that she has become finally separated from her husband, L. B. Work, and has thereby suffered and will continue to suffer great distress of mind and mental anguish, and has lost and will continue to lose forever his society, comfort, love, and affection, as well as the support and maintenance which he would give her. On or about February 15, 1910, the husband "separated from plaintiff, and from their said children, and departed from the said county of Kings, and has gone to parts unknown to plaintiff with intent

to desert and abandon plaintiff." It is not alleged that defendant, who is the husband of an aunt of plaintiff, ever said or did anything to influence the husband to leave plaintiff, or to cause any change of feeling on his part toward her. It is frankly alleged that his departure was caused solely by the fact that she became very angry with him, refused to see him, refused to speak or talk with him, sent him a letter in which she told him that she would hold no further communication with him, but would sue him for a divorce and that she hoped she might never see or speak to him again. Her complaint characterizes her conduct toward her husband, alleged to be the sole inducement for his departure, as "harsh and cruel treatment" of him. The claim of any liability on the part of defendant to her on account of the separation is based on allegations to the effect that her attitude and conduct toward her husband, which caused the separation, were wholly induced by certain false statements knowingly made to her by defendant concerning her husband, which, owing to her confidence and trust in defendant, she fully believed and relied upon, and certain advice and counsel given to her by defendant in the matter, all of which statements and advice were willfully made and given by defendant with the intent and design on his part to cause a separation between plaintiff and her husband. The complaint alleges in detail the alleged statements and advice of defendant in this behalf, and also the object sought to be obtained by him in causing a separation of the husband and wife, but no useful purpose can be subserved by stating these things here. It further alleges that when she discovered the falsity of the representations and the intent and purpose of defendant in making them, she at once instituted diligent search for her husband, but has been unable to ascertain his whereabouts. It is further alleged "that by reason of the premises hereinabove stated, defendant has unlawfully, fraudulently and wrongfully abducted and enticed from the plaintiff her said husband, and that by reason of the said abduction, this plaintiff has suffered," etc., to her great damage in the sum of fifteen thousand dollars.

Under our statutes, a wife may maintain an action for damages suffered by her by reason of the abduction or enticement from her of her husband, as may a husband for the

damages suffered by him for the abduction or enticement from him of his wife, and in such an action by the wife her husband is not a necessary party plaintiff. (See Civ. Code, sec. 49, subds. 1 and 2; *Humphrey v. Pope*, 122 Cal. 253, [54 Pac. 847].) It may be assumed, purely for the purposes of this decision, that no cause of action for the abduction or enticement of her husband from her is stated by the wife in her complaint. The direct cause of her husband's departure was, of course, her own conduct toward him, and such departure was in no degree brought about by any statement or act of the defendant, except in so far as his statements and advice to the plaintiff influenced her conduct toward her husband, which was the sole direct cause of his leaving, and of any change in his feelings toward her. It may well be argued that the facts alleged indicate rather an abduction or enticement of the wife from her husband by defendant, for which the husband would have the right to maintain an action for damages against him, than an abduction or enticement from the wife of her husband by defendant. Of course, it may be claimed, with some show of reason, that by means of the fraud practiced upon her the wife was a mere instrument in the hands of defendant by means of which he willfully accomplished the taking away or enticement of her husband from her, and that he is therefore responsible to her in damages as for an abduction or enticement *of the husband*. But it is uncertain whether in any such case where the plaintiff's own conduct in the matter, however produced, is the sole operative cause of the separation, it can fairly be held that he or she may maintain an action based on the theory that another has accomplished the abduction or enticement away of the other spouse, and we prefer to leave the question undecided here, as its determination is not, as we view the case, essential.

We can see no reason why, regardless of the question we have just referred to, the matters alleged in the complaint do not show a cause of action in behalf of plaintiff against defendant. According to the complaint, the sole cause of the conduct of plaintiff causing the separation of the husband and wife, with the same injurious consequences to her that would have followed the abduction or enticement of her husband from her, was the action of defendant in making to her

the willfully false representations concerning her husband, for the very purpose and with the design on his part to so influence her as to bring about such a separation. His deception in the matter was the sole cause of such conduct on her part, and such conduct on her part was tantamount to a refusal by her to continue the relation between her husband and herself of husband and wife. It is declared in section 1708 of the Civil Code that "every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights," and in section 1709, "one who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." These are but statements of the well settled law independent of statute. It is substantially said in 20 Cyc. at page 10, and the statement is well supported by the authorities, that as a general rule, an action for damages for deceit will lie wherever a party has made a false representation of a material fact susceptible of knowledge, knowing it to be false or not having sufficient knowledge on the subject to warrant the representation, with the intent to induce the person to whom it is made, in reliance upon it, to do or refrain from doing something to his pecuniary hurt, when such person, acting with reasonable prudence, is thereby deceived and induced to so do or refrain, to his damage. No reason is apparent to us why the alleged facts set forth in the complaint should not be held to bring the case within the operation of this rule.

It is no answer to such an action that the action or conduct of the plaintiff is the direct cause of the result occasioning damages. Such is the situation wherever such an action is allowed. The whole basis of the action is that such act or conduct is fraudulently induced by the defendant. A is willfully deceived by B into selling goods to C upon credit, by false representations as to C's solvency willfully and knowingly made by B to A for the very purpose of inducing him to so do and thereby suffers a pecuniary injury. The direct and immediate cause of the injury is, of course, the sale by A to C on credit. But B is held liable to A for the damage thereby suffered because by fraud he induced A to make such sale on credit.

It may be urged that a person fraudulently misled cannot found his claim on conduct violative of sound morals or public policy, or of a criminal statute. Here the conduct and attitude of the wife causing the separation was her harsh and cruel conduct toward her husband, her refusal to live with him or to see him, her refusal to further continue the relationship of husband and wife, etc. Of course, all her conduct would have been fully justified if the representations made to her by defendant had been true in point of fact, as the complaint sufficiently alleges that plaintiff believed to be the situation. It has been held that where the fraudulent representation is intended to create and actually does create in the mind of the party a belief that under the circumstances represented the act which he is induced to do is neither illegal nor immoral, he may recover the damages he has sustained even though a statute makes the act a criminal offense. (See 20 Cyc. 80; *Burrows v. Rhodes*, [1899], 1 Q. B. 816; *Prescott v. Norris*, 32 N. H. 101; *Morrill v. Palmer*, 68 Vt. 1, [33 L. R. A. 411, 33 Atl. 829].) We are not called upon to go as far as this in this case. The complaint indicates no criminal offense on plaintiff's part. Certainly, however, under the circumstances stated, it cannot fairly be said that plaintiff did not believe her conduct toward her husband to be in full accord with good morals and public policy, or was not justified in so believing. It is not claimed that the complaint does not sufficiently show that plaintiff acted with reasonable prudence in accepting as true and relying on defendant's statements. In view of the circumstances alleged as to her relationship to defendant, and her confidence and trust in him, we think the complaint is not fatally defective in this regard, although it must be conceded to be somewhat remarkable that a wife having any affection for or confidence in her husband should be willing to accept as true such statements as are here alleged to have been made to her, without making some further inquiry.

We have not found any case in which the remedy of action for damages for deceit has been invoked under such circumstances as appear here. The fact that the case presented is unique in its circumstances is not, however, any warrant for a refusal to apply a rule that appears, on principle, to be applicable. We think the facts confessed by the demurrer

show a liability on the part of defendant to plaintiff for any damage caused her by the loss of her husband.

We are unable to see any force in any other objection made by the demurrer.

It is earnestly urged that the husband is a necessary party plaintiff, and that the ruling of the trial court should be sustained on this ground. Treating the action as purely one for damages for deceit, it may be conceded that defendant had the right to insist that the husband was a necessary party. Under our law in this state, any damages recovered herein, as in actions for damages for personal injury to the wife or one for malicious prosecution of the wife, would be community property, and while, under the decisions, the wife is a necessary party plaintiff in an action for damages for such injuries to her, unless she is living separate and apart from her husband *by reason of his desertion of her*, or by agreement, in writing, she cannot properly sue for such damages without making her husband a party plaintiff. (Code Civ. Proc., sec. 370; *McFadden v. Santa Ana etc. Ry. Co.*, 87 Cal. 464, [11 L. R. A. 252, 25 Pac. 681]; *Tell v. Gibson*, 66 Cal. 247, [5 Pac. 223]; *McKune v. Santa Clara etc. Co.*, 110 Cal. 480, 487, [42 Pac. 980]; *Williams v. Casebeer*, 126 Cal. 77, [58 Pac. 380]; *Paine v. San Bernardino etc. Co.*, 143 Cal. 654, 658, [77 Pac. 659].) The complaint here shows upon its face that the plaintiff is a married woman, and it may be conceded that it also shows that she and her husband are not living separate and apart *by reason of his desertion of her*. But our Code of Civil Procedure expressly provides among the several grounds of demurrer the ground that there is a defect of parties plaintiff or defendant. (Code Civ. Proc., sec. 430, subd. 4.) No such ground is specified in the demurrer in this case. An objection for nonjoinder of the husband in such an action must be specially urged by demurrer if the matter appears on the face of the complaint, and by answer, if it does not so appear (Code Civ. Proc., secs. 433 and 434), and if not taken either by demurrer or answer, it must be deemed to have been waived. (Code Civ. Proc., sec. 434.) It is not a matter going to the statement of a sufficient cause of action or to the jurisdiction of the court. This was substantially held in *Baldwin v. Second Street etc. Co.*, 77 Cal. 390, [19 Pac. 644]. In *Lamb v. Harbaugh*, 105 Cal. 680, 690, [39

Pac. 56], the objection was made by way of abatement, in the answer, the facts warranting it not appearing on the face of the complaint.

The judgment is reversed and the cause remanded, with directions to the lower court to overrule the demurrer to plaintiff's amended complaint, with leave to defendant to answer.

Shaw, J., and Sloss, J., concurred.

Hearing in Bank denied.

[Crim. No. 1743. In Bank.—December 16, 1912.]

THE PEOPLE, Respondent, v. AH LEE, Appellant.

CRIMINAL LAW—MURDER—PHOTOGRAPH OF PLACE OF HOMICIDE—SUFFICIENT EVIDENCE OF CORRECTNESS.—In a prosecution for murder, a sufficient foundation is laid for the admission in evidence of a photograph showing the relative location in the room in which the homicide took place, at the time thereof, of certain personal objects, by the testimony of a witness to the effect that he was in the room and took the negative of the photograph shortly after the killing and at a time when such objects were in exactly the same position that they were at the time of the homicide, and that the photograph offered in evidence, which had been finished by a photographer to whom he had given the negative for that purpose, was a correct representation of the objects sought to be shown and their relative location at the time he took the picture.

Id.—OVERCOAT WORN BY DEFENDANT—EVIDENCE OF IDENTIFICATION.—In such prosecution, an overcoat worn by the defendant at the time of his arrest, on the day following the homicide, was properly admitted in evidence, where there was testimony tending to show that he was seen on a street of the town in which the homicide was committed, and shortly before its occurrence, in the company of his codefendant, wearing an overcoat similar to the one received in evidence, and also testimony tending to show that one of the two men committing the murder wore at the time such an overcoat.

Id.—INSTRUCTION—REASONABLE DOUBT.—A general instruction on the subject of reasonable doubt, which is otherwise free from error, is not rendered objectionable by the inclusion therein of the phrase "a reasonable doubt is not a mere guess or surmise."

ID.—MOTIVE—REQUESTED INSTRUCTIONS—SUBJECT MATTER COVERED BY INSTRUCTION GIVEN.—It was not error for the court to refuse to give an instruction requested by the defendant on the question of motive, where the subject matter of the requested instruction was fully covered, so far as it could be reasonably claimed that defendant was entitled to have it covered, by an instruction given to the effect that there could be no presumption of motive in the absence of a showing thereof, and that the jury had the right to consider the absence of motive in determining the guilt or innocence of defendant.

APPEAL from a judgment of the Superior Court of Stanislaus County and from an order refusing a new trial.
L. W. Fulkerth, Judge.

The facts are stated in the opinion of the court.

Oliver Dibble, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

ANGELLOTTI, J.—The defendant Ah Lee and one Ye Quong were jointly charged by information filed in the superior court of Stanislaus County on April 15, 1912, with the crime of murder, alleged to have been committed in said county on March 25, 1912. Ah Lee demanded and was accorded a separate trial, which resulted in a verdict of "guilty of murder of the first degree." His motion for a new trial was denied, and on May 11, 1912, judgment of death was pronounced. This is an appeal by said defendant from the judgment and from an order denying his motion for a new trial.

No claim is made that the verdict is without sufficient support in the evidence, and an examination of the record shows that there is no foundation for any such claim. The evidence is without conflict on the proposition that during the evening of March 25, 1912, in his place of business in Newman, Stanislaus County, the deceased, Sue Hoo Kee, was shot by two Chinamen who apparently entered the place solely for the purpose of killing him, who then and there inflicted upon him several mortal gunshot wounds, which at once caused his death, and immediately thereafter left the place. There was sufficient evidence to warrant a conclusion on the part of the jury that said Ah Lee was one of the murderers.

A photograph was received in evidence over the objection of defendant, to show the relative location in the room of deceased, at the time of the shooting, of a bed, a stove, and a lamp. Even if there was error in the admission of this photograph, we do not see how, in view of the evidence as to the shooting, it could be held that it was in the slightest degree prejudicial to defendant. But we perceive no error in the matter. The photograph was taken by the witness Newsome shortly after the shooting, and at a time when the objects referred to were in exactly the same position that they were at the time of the shooting. Newsome was a constable and was in the room immediately after the shooting, and so testified. While a photographer, who was not called as a witness, finished the picture from the negative given him by Newsome for that purpose, Newsome testified substantially that the finished picture offered in evidence was a correct representation of the objects sought to be shown and their relative location at the time he took the picture. A sufficient foundation for the admission of the photograph was thus laid. It is not claimed that the photograph was not admissible if there was a sufficient showing that it was a correct representation of the objects sought to be shown and their relative location at the time of the shooting. The only objection urged is that there was no such showing, and we are satisfied the objection is not well based.

Mr. Newsome was allowed to testify to a conversation had with said defendant in the branch jail at Newman on March 27th. The sum and substance of the statement then made by defendant to Newsome, as testified to by the latter, was as follows: He had come from Stockton, his name was Ah Lee, he was twenty-eight years old, he had stayed in Tracy all of the Monday on which the shooting took place, he belonged to the Sue Sing Tong and had a rich company back of him. He would not say when he left Tracy. The objection made is that the voluntary character of these statements was not sufficiently established to entitle the same to be received in evidence. There was in these statements of defendant no admission by him of any fact tending to indicate his guilt. However, an examination of the record satisfies us that there was ample warrant for a conclusion on the part of the trial court that the voluntary character of the statement was suffi-

ciently established to entitle the same to be admitted in evidence.

There is no force in the objection that an overcoat was improperly admitted in evidence. It was sufficiently made to appear that it was the overcoat worn by defendant at the time of his arrest, which occurred on the day following the homicide, some eight or nine miles from Los Banos, where defendant and Ye Quong had procured an automobile to carry them to Fresno. There had been evidence given tending to show that Ah Lee was seen on a street in Newman about 6:40 P. M. on the day of the homicide, with Ye Quong, wearing an overcoat similar to the overcoat so received in evidence, and also evidence tending to show that one of the two men committing the murder wore at the time such an overcoat. Under such circumstances the People were entitled to have the coat admitted in evidence, to be considered by the jury in connection with the evidence just referred to, as tending to show that the defendant was one of the men participating in the murder.

The trial court instructed the jury as follows:

“All the presumptions of law, independent of evidence, are in favor of innocence, and every person accused of crime is presumed to be innocent until his guilt is established to a moral certainty and beyond all reasonable doubt. This presumption attaches at every stage of the case and to every fact essential to a conviction. By the term reasonable doubt is not meant every possible doubt or conjecture that may suggest itself to your minds. *A reasonable doubt is not a mere guess or surmise*, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. As I have said before, such possible doubts or imaginary doubts are not reasonable doubts. A reasonable doubt is that state of the case, which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.”

Complaint is made only of the portion that we have italicized, “a reasonable doubt is not a mere guess or surmise,” for it is admitted that otherwise the instruction as a whole has been many times held free from error. But it is said that

the insertion of the italicized words "is a departure from precedent, not justified in law." Similar phraseology was used in an instruction on reasonable doubt given in *People v. Yun Kee*, 8 Cal. App. 82, [96 Pac. 85], but no objection appears to have been there made to that part of the instruction. We are of the opinion that the insertion of these words did not render the instruction given substantially different from the general instruction on reasonable doubt that has many times been held free from error.

Complaint is made that the trial court improperly refused to give a requested instruction on the question of motive. It is apparent that the subject matter of such requested instruction was fully covered, so far as it can be reasonably claimed that defendant was entitled to have it covered, by an instruction given by the court to the effect that there can be no presumption of motive in the absence of a showing thereof, and that the jury has the right to consider the absence of motive in determining the guilt or innocence of defendant. (See Clerk's Transcript, p. 36.) Of course it is not contended that the establishment of a motive is at all essential as an element necessary to justify conviction. "The presence or absence of motive is simply a circumstance in each particular case, sometimes weak and sometimes strong, going to the question of guilt or innocence." (*People v. Owens*, 132 Cal. 469, 471, [64 Pac. 770].)

No other point is made for reversal. We have, however, carefully examined the whole record and find nothing warranting a reversal of the judgment or the order denying a new trial.

The judgment and order denying a new trial are affirmed

Shaw, J., Sloss, J., Lorigan, J., Melvin, J., and Henshaw, J., concurred.

[S. F. No. 5882. In Bank.—December 16, 1912.]

D. GHIRARDELLI COMPANY (a Corporation), Respondent v. **JEREMIAH E. HUNSICKER** and **FRITZ ERNST**, Copartners, etc., Appellants.

SALE OF MANUFACTURED PRODUCT—LIMITATION ON MINIMUM SELLING PRICE—PRODUCT SOLD CONSTITUTING ONLY SMALL PART OF MARKET SUPPLY.—A manufacturer of ground chocolate, whose total output constitutes only a small part of the general market supply of that article, may impose, as a condition of an original sale thereof to a wholesale jobber, a limitation on the minimum price at which the same may be resold at either wholesale or at retail. It is immaterial to the validity of such condition whether or not the product is manufactured in accordance with a secret process, or is protected by trademark, or is covered by letters patent.

Id.—RESALE BY ORIGINAL PURCHASER—AGREEMENT OF SECOND PURCHASER TO MAINTAIN PRICES—ENFORCEMENT BY PURCHASER.—Such a condition is enforceable by the manufacturer, not only as against the original purchasing jobber, but also as against a wholesale purchaser from him, who bought, for the purpose of selling again at retail, under a specific agreement with the jobber, which by its terms was made for the express benefit of the manufacturer, whereby he undertook to maintain the fixed retail selling price.

Id.—CONTRACT MADE FOR BENEFIT OF THIRD PERSON.—The contract of the second purchaser is one of the class referred to in section 1559 of the Civil Code, providing that "a contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

Id.—RESTRAINT OF TRADE.—Such an agreement is not unenforceable as being in restraint of trade, either under the common law or the act of Congress of July 2, 1890, known as the Sherman Anti-trust Act.

Id.—REASONABLE PROFIT OF BUSINESS—CARTWRIGHT ACT.—Where it appears that the only object of such agreement was to enable the manufacturer to conduct his business at a reasonable profit, the agreement is not within the prohibitory provision of the so-called Cartwright Act of this state (Stats. 1907, p. 984), as amended in 1909 (Stats. 1909, p. 593).

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Wm. M. Madden, for Appellants.

Henry J. Brodsky, for Respondent.

ANGELLOTTI, J.—This is an appeal from a judgment enjoining defendants from selling or offering to sell a product of plaintiff known as Ghirardelli's ground chocolate, except at prices in direct conformity with the schedule embodied in the notice or label attached to plaintiff's product, which declares the fixed minimum retail price to be thirty cents for one lb. tins and eighty cents for three lb. tins. The judgment was entered upon defendants' failure to answer, after their demurrer to the complaint had been overruled. The demurrer was practically a general demurrer for want of facts sufficient to constitute a cause of action.

The complaint seeking the injunction granted sets forth substantially the case which was presented in *Grogan v. Chaffee*, 156 Cal. 611, [27 L. R. A. (N. S.) 395, 105 Pac. 745], with the exception that the defendants did not purchase plaintiff's product which they offered to sell and did sell at retail to the public at prices below those fixed by the schedule, from the plaintiff, but from one of the jobbers or wholesale grocers doing business in San Francisco who had purchased from plaintiff, upon the same general conditions on which Chaffee bought olive oil from Grogan in *Grogan v. Chaffee*, 156 Cal. 611, [27 L. R. A. (N. S.) 395, 105 Pac. 745]. The notice annexed to each box or case of such product sold by plaintiff was the same as the notice affixed by Grogan to each package of his olive oil, except in the specification of the product and price. The notice was as follows:

“Important Notice.

“The goods contained in this case are sold on the *express* condition, made a part of the consideration of the sale, whether same is made by the manufacturer or wholesaler, that the purchaser, if he retails them, will maintain our *fixed retail price* on these goods, and if he wholesales them he will do so subject to the same condition. The acceptance of these goods is an agreement to comply with this condition and a guarantee not to retail them, under any circumstances for less than the established price.

“Our fixed minimum retail price on Ghirardelli’s Ground Chocolate for the Pacific Coast is 30c per 1 lb. tins and 80c for 3 lb. tins.

“D. GHIRARDELLI COMPANY.”

In addition to the allegations contained in the complaint in *Grogan v. Chaffee*, 156 Cal. 611, [27 L. R. A. (N. S.) 395, 105 Pac. 745], it is alleged that this notice is always brought by plaintiff conspicuously to the attention of the trade, and chocolate is purchased by the jobbers and dealers and all who buy, under and subject to each and all the restrictions; that defendants purchased at wholesale from a jobber or wholesale grocer, for the purpose of selling again at retail, a certain quantity of said chocolate, which bore said notice on each case in a conspicuous place, and of which said notice defendant then and there had full knowledge; that “defendants purchased same under an agreement made at the time of such sale by and between the defendants and the jobber or wholesale grocer hereinbefore referred to, wherein and whereby and by the terms of which and for a valuable consideration, it was understood and agreed that the defendants herein in purchasing the product of plaintiff, to wit, Ghirardelli’s Ground Chocolate, did so upon the distinct understanding and agreement that they would maintain the fixed retail selling price, and . . . that at the time said agreement was made and entered into, it was understood and agreed that the same was made for the express benefit of the plaintiff herein and the defendants thereby contracted and agreed that they would not sell said Ghirardelli’s Ground Chocolate for less than 30c for 1 lb. tins and 80c for 3 lb. tins.”

It is complained that nevertheless defendants are offering for sale and are selling said product for prices below those specified, to the great damage of plaintiff. There are specific averments as to the nature of the damage so caused.

The fact alleged that the product is manufactured, prepared, and packed by plaintiff “in accordance with certain secret processes and formula of its own” is in no way material. Upon this point the reasoning of the supreme court of the United States in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, [55 L. Ed. 502, 31 Sup. Ct. Rep. 376, 382 and 383], is unanswerable. Nor is the matter of trademark of any importance. “A trademark, or a trade name

or trade dress, have no other effect than to prevent one from 'palming' off his goods for those of another.'" (*Park & Sons Co. v. Hartman*, 153 Fed. 24, 28, [12 L. R. A. (N. S.) 135, 82 C. C. A. 158]. See, also, *Garst v. Hall*, 179 Mass. 588, [55 L. R. A. 631, 61 N. E. 219].) No infringement of trademark or trade dress is here alleged. It is not alleged that the product is covered by letters patent, so we have no question of the rights conferred by statute upon a patentee of an article. The same was true as to the product involved in *Grogan v. Chaffee*, 156 Cal. 611, [27 L. R. A. (N. S.) 395, 105 Pac. 745].

In view of the allegations as to the agreement entered into by defendants with the jobber or wholesaler at the time of the purchase of the goods by them, for the express benefit of the plaintiff, the case presented here is practically the same case that was presented in *Grogan v. Chaffee*. It appears from the complaint that such wholesaler or jobber had acquired the goods from plaintiff upon the agreement on his part that if he sold the same at wholesale he would do so subject to the same conditions that had been imposed on him as to retail sales. If this was a valid undertaking on his part, he was not only authorized but bound to make such a contract as he is alleged to have made, for plaintiff's benefit, with any person to whom he sold the goods at wholesale. It is positively alleged that he did make such a contract with defendants, and that it was understood and agreed between them that the same was made for the express benefit of plaintiff. So far as appears such agreement was based on a sufficient consideration. No reason is apparent why it can be held that the contract thus alleged is not one of the class referred to in section 1559 of the Civil Code where it is provided that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." (See *Washer v. Independent M. & D. Co.*, 142 Cal. 708, [76 Pac. 654]; *Malone v. Crescent City etc. Co.*, 77 Cal. 44, [18 Pac. 858].) If the goods in the hands of the wholesaler or jobber, who had purchased directly from plaintiff, were subject to the conditions we have specified, including the stipulation that if he sold the same at wholesale he would do so subject to the same conditions, the situation presented by the complaint is in all respects substantially the

same as if defendants had purchased directly from plaintiff upon the same terms and conditions as the jobber or wholesale purchaser. Under these circumstances we are not called upon to consider the question suggested, but not decided in *Grogan v. Chaffee*, 156 Cal. 611, [27 L. R. A. (N. S.) 395, 105 Pac. 745], whether such a contract between the manufacturer and his immediate vendee could be enforced against persons who might come into possession of plaintiff's product with notice of the restriction imposed by him on its sale, but without having any direct agreement to respect such restriction. (See *Garst v. Hall etc. Co.*, 179 Mass. 589, [55 L. R. A. 631, 61 N. E. 219].) It may be assumed as said in *Park & Sons Co. v. Hartman*, 153 Fed. 39, [12 L. R. A. (N. S.) 135, 82 C. C. A. 173], that "the restrictions imposed by complainant upon sales and resales, if valid at all, are only so because they constitute personal contracts upon which an action will lie only against the contracting party."

It was held in *Grogan v. Chaffee*, that under the circumstances there appearing, the contract involved was not unenforceable as being in restraint of trade. Much consideration was given by the court to that question, a rehearing having been granted to give further consideration to the views of the United States circuit court of appeals for the sixth circuit in certain patent medicine cases (153 Fed. 24, [12 L. R. A. (N. S.) 135, 82 C. C. A. 158], and 164 Fed. 803, [90 C. C. A. 579]), and all of the justices of this court except the chief justice and the writer of this opinion concurred in the judgment given and the reasons expressed therefor. Since that decision was rendered, the supreme court of the United States has decided *Dr. Miles Medical Co. v. Park & Sons Co.*, being the same case reported in 164 Fed. 803, [90 C. C. A. 579], affirming the judgment of the circuit court of appeals, 220 U. S. 373, [55 L. Ed. 502, 31 Sup. Ct. Rep. 376]. It may be conceded that in this case contracts of the manufacturer of certain proprietary medicines with his vendees, designed to fix the retail price of such product, of which he was the sole manufacturer, were held to be void as being in undue restraint of trade both under the common law and the act of Congress of July 2, 1890, 26 Stats. 209, [U. S. Comp. Stats. 1901, p. 3200, 7 Fed. Stats. Ann. 336], (the Sherman Anti-trust Act), although as suggested in the opinion in *Grogan*

v. *Chaffee*, 156 Cal. 611, [27 L. R. A. (N. S.) 395, 105 Pac. 745], it appears to us that neither this case nor the case of *Park v. Hartman*, 153 Fed. 24, [12 L. R. A. (N. S.) 135, 82 C. C. A. 158], "involved the question here presented, i. e., the enforceability, as between the parties, of a contract of the kind here shown." But we think there is a distinction between these cases and the case at bar and *Grogan v. Chaffee*, in at least one respect material to the question under consideration. In each of the federal cases, the contract involved the *whole* of a certain product, in one case the product being a certain well-known proprietary medicine named "Peruna," and in the other case the product consisting of certain well-known proprietary medicines. The opinion of Mr. Justice Lurton (then circuit judge) in *Park v. Hartman*, 153 Fed. 24, [12 L. R. A. (N. S.) 135, 82 C. C. A. 158], quoted in part by the United States supreme court in *Dr. Miles etc. Co. v. Park etc. Co.*, 220 U. S. 373, [55 L. Ed. 502, 31 Sup. Ct. Rep. 376], shows the effect of the contracts involved in that case to be the absolute prevention of any competition in respect to prices between retailers who supplied the public with the product named, amounting to a complete restraint as to "Peruna" generally. The learned judge was here talking of a case where the whole supply of the article on the market, by whomsoever manufactured, was involved, for he said: "It is true that the complainant is not in a combination with other makers of 'Peruna.' There are no others. If there were, there would not be a complete or general restraint; for it might then happen that these others, not being bound by any covenants, could supply the public. If the supply to come from them was adequate for the public demand, the public might be in no wise affected. Now, if the complainant had absorbed all the sources from which the demand for lumber, or furniture, or stoves could be supplied, and then should say, 'I will sell only to those who will resell only to those I shall license to buy and only at the price I dictate,' could any voice be raised to say that the covenants which every dealer should sign in order to prevent exclusion from trade in such articles, would be upheld by the courts?" *Grogan v. Chaffee*, 156 Cal. 611, [27 L. R. A. (N. S.) 395, 105 Pac. 745], did not involve a contract affecting the whole or even any large proportion of the supply of olive oil available in the market.

This feature was expressly recognized by the court in discussing the question of attempted monopoly and unreasonable restraint of trade. It was said: "The contract here relied on does not relate to any olive oil except that manufactured by plaintiff. There is no suggestion that this comprises all, or any large portion, of the olive oil manufactured or sold in the market supplied by plaintiff. While plaintiff alleges that he manufactures oil by a process of his own discovery, there is nothing exclusive in the product resulting from this process. All that he claims for his oil is that it is pure and wholesome. The court must assume, as a matter of common knowledge, that others may and do manufacture pure olive oil in considerable quantities." The same is substantially true of plaintiff's ground chocolate. That it comes anywhere near controlling the market in ground chocolate is not suggested, and as a matter of common knowledge we do know that others may and do manufacture and sell such chocolate in considerable quantities. Plaintiff simply claims to be producing a superior quality of ground chocolate. This feature, common to this case and that of *Grogan v. Chaffee*, which was taken by the federal courts to be absent from the cases decided by them which we have referred to, is a most material matter in the determination of the question whether such restraint of trade as results from the contract, is such as to render the contract void as imposing an unreasonable restraint. It is expressly recognized by the supreme court of the United States, in *Dr. Miles Medical Co. v. Parks*, 220 U. S. 373, [55 L. Ed. 502, 31 Sup. Ct. Rep. 376], that the mere fact that some restraint results does not render the contract void. It was said by the court, through Mr. Justice Hughes: "With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy. . . . Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the

contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. (Citing cases.)” The opinion of Mr. Justice Lurton in *Park & Sons v. Hartman*, 153 Fed. 24, [12 L. R. A. (N. S.) 135, 82 C. C. A. 158], indicates that he would uphold such a covenant as is here involved where it is “no more than necessary to afford a fair protection to the business of the complainant and not so large as to interfere with the interests of the public.” He further said: “There can be no hard and fast rule by which the result can be reached in such cases. At last the question must come to this: ‘What is a reasonable restraint with reference to a particular case?’” We do not think that the federal cases relied on should be construed as holding that such contracts as are involved in *Grogan v. Chaffee*, and in this case, are, under such circumstances as appear in these cases, unenforceable as being in restraint of trade, either under the common law, or the act of Congress known as the Sherman Anti-trust Act. Of course we are not in this case concerned with any question of interstate commerce, so that any question as to the effect of that act is not involved. We see no reason for modifying the rules expressed in *Grogan v. Chaffee*, 156 Cal. 611, [27 L. R. A. (N. S.) 395, 105 Pac. 745], upon the question there decided.

It is urged that the agreement here sought to be enforced is within the prohibitory provisions of the so-called Cartwright Act of this state enacted in 1907 (Stats. 1907, p. 984), as amended in 1909 (Stats. 1909, p. 593). This is a question not decided in *Grogan v. Chaffee*, 156 Cal. 611, [27 L. R. A. (N. S.) 395, 105 Pac. 745]. It may be conceded purely for the purposes of this decision that the agreement was contrary to the policy of that law (Civ. Code, sec. 1667, subd. 2), as such law existed prior to the amendment of 1909. So conceding, it is clear that the proviso annexed by such amendment to section 1 of the act, the section defining the various kinds of combinations constituting a trust within the meaning of the act, and the only section upon which reliance can be based for a claim that the contract here involved is opposed to the policy of such act, entirely answers the contention of defendants. That proviso, so far as material here, is: “pro-

vided that no agreement, combination or association shall be deemed to be unlawful or within the provisions of this act, the object and business of which are to conduct its operations at a reasonable profit." The complaint here sufficiently shows that such was the only object of plaintiff in the matter of the agreement herein involved. ✓

It is not urged that the complaint does not sufficiently show that the conditions imposed were necessary to afford a fair protection to plaintiff's business. In fact, the only points made in defendants' brief against the judgment are those we have discussed.

The judgment is affirmed.

Sloss, J., Shaw, J., Melvin, J., Henshaw, J., and Lorigan, J., concurred.

[L. A. No. 3012. Department One.—December 17, 1912.]

HOMER A. CLARK, Respondent, v. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellant.

NEGLIGENCE—RAILROAD—CONTRIBUTORY NEGLIGENCE—VOLUNTARILY TAKING POSITION OF DANGER ON STEP OF PLATFORM.—An experienced locomotive fireman, traveling to the particular place of his employment on a regular passenger train of the railroad that employed him, is guilty of contributory negligence, if, in anticipation of jumping from the train at a roundhouse a considerable distance from its regular stopping place, he voluntarily placed himself on the lower steps of the platform of the car, holding on by the hand rails, at a time when he knew the train was rounding a double curve, and approaching a switch and going at a speed of thirty miles an hour, and while in such position was thrown to the ground as the result of the swaying of the car.

ID.—PROMISE OF ENGINEER TO SLOW UP PASSENGER TRAIN—EVIDENCE—WANT OF AUTHORITY IN ENGINEER.—In an action against the railroad to recover for the personal injuries so occasioned, it was error to allow the plaintiff to testify that the engineer of the train promised that he would slow up opposite the roundhouse to allow plaintiff to jump off, provided the train was on time, without first requiring proof that the engineer was authorized by the railroad to slow up trains for that purpose.

ID.—NEGLIGENCE OF ENGINEER IN MAKING OR FAILURE TO KEEP PROMISE.—The unauthorized promise of the engineer to slow up, not having been within his actual or ostensible authority, nor within the apparent scope of his duty, and his lack of authority having been known to the plaintiff, was inadmissible in such action as evidence of want of care by the engineer either in making the promise or in failing to keep it.

ID.—REBUTTAL OF CONTRIBUTORY NEGLIGENCE.—Evidence of such promise was not material in rebuttal of the plaintiff's contributory negligence in putting himself in such position at a time when he knew that the train was going thirty miles an hour and that it could not be slowed up enough to allow him to jump off.

ID.—PLEADING—FAILURE OF PROOF—VARIANCE.—Where the complaint alleged that the defendant negligently ran its trains around the curve at a high speed, causing it to violently sway so as to break plaintiff's hold on the rods, whereby he was thrown from the car to the ground, the fact that the plaintiff failed to prove that the engineer has authority to slow up the train, made simply a failure of proof and not a variance.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. M. T. Dooling, Judge presiding.

The facts are stated in the opinion of the court.

E. W. Camp, U. T. Clotfelter, M. W. Reed, and A. H. Van Cott, for Appellant.

Gray, Barker, Bowen, Allen, Van Dyke & Jutten, and Flint, Gray & Barker, for Respondent.

SHAW, J.—The plaintiff sued to recover damages for personal injuries alleged to have been caused by the negligence of defendant in the management of its passenger train. There was a verdict and judgment in favor of the plaintiff, from which, and from the order denying its motion for a new trial, the defendant appeals.

The answer denied the material allegations of the complaint and, as an affirmative defense, alleged that if the plaintiff suffered either or any of the injuries alleged in his complaint, the same were caused solely by his own carelessness and negligence.

We think, upon the plaintiff's own testimony, he was clearly guilty of contributory negligence sufficient to bar a recovery. He was a locomotive fireman and had been in the employ of the defendant for more than two years prior to the accident as an "extra man," being sent from place to place to act as fireman where there was a temporary vacancy. On the day of the accident he was directed to go from Los Angeles to San Bernardino to take a position there as fireman and had been given an order allowing him to ride to San Bernardino on a regular passenger train of the company. When nearing San Bernardino, in accordance with a promise which he said the engineer had made to slow up so as to allow him to jump off the train at the roundhouse eighteen hundred feet before reaching the station, he went out on the platform of the front car intending to get upon the lower step and jump therefrom when the train should slow up. When he reached the platform he noticed that the train was upon a double curve and was about to pass a switch leading to a "Y." He testified that it was then going at the rate of thirty miles per hour and that he knew it could not be stopped in time to allow him to jump off. Nevertheless he got down on the lower step and stood there with his hands holding the rods and with a small package of clothes swinging over his thumb. While he was in that position the force of the car swinging around the double curve threw his body first in toward the platform and then out from it with such force as to break his hold on the rods and throw him violently to the ground. It needs no argument to establish the proposition, that it is negligence for one to put himself in that position with a train going at that rate over such a track. The plaintiff had previously worked at the San Bernardino yard and was entirely familiar with the switch and the curves over which the train was going. He was also familiar with the speed of trains and knew that it would be unsafe to jump off. He had no orders to get off the train at that place, or in that way, it was no part of his duty at that time and he was under no compulsion to do so. He voluntarily placed himself in this dangerous position knowing the peril and he is clearly chargeable with contributory negligence. The accident occurred in October, 1909. The statute, declaring that damages may be recovered, not-

withstanding the contributory negligence of the person injured, was not enacted until 1911.

The court erred in allowing the plaintiff to testify that the engineer promised that he would slow up opposite the roundhouse to allow plaintiff to jump off, provided the train was on time, without first requiring proof that the engineer was authorized by the defendant to slow up trains for that purpose. The plaintiff testified that this train was a regular passenger train, that by the rules of the company it was required to run on schedule time and that it was at that time four minutes late. Not being ahead of time, there was no occasion for it to slow up. It is common knowledge that the running time and the stopping places of regular passenger trains upon a railway are controlled by schedules and are in charge of a train dispatcher who communicates his orders from time to time for the management of the train. If the engineer were allowed to modify the speed and slow up his train at will to allow passengers to jump off at places along the road, it is obvious that the schedule would often be greatly disarranged. The duty of the engineer is merely to run the engine and thereby to move and stop the train according to the schedule prepared for him and the orders of those who have authority to change it. It would be so far out of the ordinary course of business and so improbable in the nature of things that an engineer should have authority to make such agreements with passengers, that one who would claim an advantage against the company solely by reason of a promise by the engineer to slow up for such purpose, must be charged with the burden of proving that the engineer had authority to make the promise and carry it out.

The plaintiff contends that the promise to slow up, although unauthorized, was admissible as evidence of want of care by the engineer first, in making the promise, and second, in failing to keep it. This might be sound doctrine if the action were against the engineer alone. But the company can be held responsible for the negligent acts of its servants only when such acts are within the actual or ostensible authority of the servant, or within the apparent scope of his duty. There are, of course, numerous cases in which railroad companies have been held liable for such negligent acts, although it appeared that the acts were unauthorized, or were expressly forbidden. The failure to ring a bell or sound a

whistle at crossings, running at forbidden speed, and the like, are familiar examples. But in all these cases the test is whether the negligent act "was done in the particular business that the servant was employed to do." (*Cosgrove v. Ogden*, 47 N. Y. 257, [10 Am. Rep. 361].) "The master is not responsible if the wrong done by his servant is done without his authority and not for the purpose of executing his orders or doing his work." (*Howe v. Newmarsh*, 94 Mass. 57.) "The master's liability does not depend on the question whether the act was one which the master ought to have understood would be done by the servant, but rather upon the circumstances whether it was so far an incident to the particular service in which he was engaged, that it may be said to have been done in the line of his duty, and in furtherance of his master's business." (Wood on Master and Servant, sec. 280.) The engineer was not employed to slow trains, or promise to slow them, wherever passengers wished to get off, but to run trains from station to station on schedule time and under orders from those higher in authority. The promise was not in the line of his duty, or incident to the work he was set to do, or a part of it, and it was not made in execution of any order of the company or in furtherance of any duty resting upon him. The negligent slowing of a train by the engineer without authority, might, of course, cause an injury to some person, for which the company would be liable in damages. But this would not be so if the person injured was one who knowing the lack of authority, had procured from the engineer the promise to slow up at that place. The mere fact that he was the engineer does not justify third persons in taking such promise on the assumption that he has such authority, nor make such promise the act of the company.

It was not material in rebuttal of the contributory negligence shown. It did not tend to disprove the negligent act which contributed to his injury. At the time he got down upon the step, he says he knew that the train was going thirty miles an hour and that it could not be slowed up enough to allow him to jump off. He therefore knew that the promise was not to be and could not be performed, and he cannot claim that he put himself in the perilous position on the bottom step, which was his act of negligence, in reliance upon

the promise, or in the expectation that it would be fulfilled. It therefore furnished no excuse for his negligent act.

The defendant's claim that there is a variance between the negligence charged and that which the plaintiff sought to prove, is not tenable. The charge was that the defendant negligently ran its trains around the curve at a high speed, causing it to violently sway, jerk, and jolt so as to break plaintiff's hold on the rods, whereby he was thrown from the car to the ground. If the promise, which the plaintiff testified the engineer had made, had been within the scope of the engineer's duty or authority, the failure to keep the promise and the running of the train at a high rate of speed at the place where he had promised to slow up, would have constituted negligence on the part of the defendant, within the terms of the charge. The fact that the plaintiff failed to prove that the engineer had such authority, made simply a failure of proof, and not a variance.

Because of the errors above set forth it is necessary to reverse the judgment and order.

The judgment and order are reversed.

Sloss, J., and Angellotti, J., concurred.

Hearing in Bank denied.

. [L. A. No. 3294. Department One.—December 18, 1912.]

In the Matter of the Estate of ROBERT NICCOLLS,
Deceased.

ESTATES OF DECEASED PERSONS—HOMESTEAD FROM SEPARATE PROPERTY MUST BE FOR LIMITED PERIOD.—Under section 1468 of the Code of Civil Procedure, as amended in 1881, where no homestead has been selected during the lifetime of the decedent, the court in probate, in setting apart a homestead from the separate property of the decedent, can set it apart for a limited period only.

ID.—COMMUNITY PROPERTY—PRESUMPTION—EVIDENCE TO OVERCOME—BURDEN OF PROOF.—All property acquired by either spouse during the existence of the marriage is presumed to be community property, and the burden of overcoming the presumption by clear and satisfactory evidence rests upon the party claiming that the property is separate.

ID.—CHARACTER OF PROPERTY REMOVED FROM ANOTHER STATE.—If a husband and wife acquire personal property in one state and then remove with the same into a state in which the community law prevails, the law of the state where they lived when the property was acquired will govern as to whether it be separate or community property.

ID.—PROPERTY ACCUMULATED DURING MARRIAGE IN ILLINOIS—NOT COMMUNITY PROPERTY IN CALIFORNIA.—There is not in the state of Illinois such a thing as community property. Consequently, property accumulated in that state by a man and wife during their marriage, and subsequently brought into the state of California, did not, nor did any property for which it was there exchanged, become community property in the latter state.

ID.—ORDER SETTING APART HOMESTEAD ABSOLUTELY—ERRONEOUS FINDING OF COMMUNITY PROPERTY—EVIDENCE OF SEPARATE PROPERTY OF WIFE.—An order in probate setting apart a homestead to and vesting it absolutely in the surviving wife of the decedent, which is based on an erroneous finding that the property set apart was community property, cannot be upheld on the theory that the evidence showed that the property was the separate property of the wife.

ID.—PROCEEDING TO SET APART HOMESTEAD—JURISDICTION—TITLE AND ADVERSE CLAIMS NOT INVOLVED.—In a proceeding to set apart a homestead from the estate of a decedent, the court has no jurisdiction to determine the title to the property, or the validity of any claim of title adverse to that of the estate. Such a proceeding is based on the theory that the property sought to be set aside is a part of the estate of the decedent, and any title the applicant might claim in it as separate property is not involved and cannot be adjudicated.

APPEAL from an order of the Superior Court of San Diego County setting apart a homestead from the estate of a deceased person, and from an order refusing a new trial.
W. R. Guy, Judge.

The facts are stated in the opinion of the court.

Mills & O'Farrell, W. J. Mossholder, and Marks P. Mossholder, for Appellants.

Luce & Luce, for Respondent.

SLOSS, J.—Robert Niccolls, a resident of the county of San Diego, died intestate, leaving property in that county

and elsewhere. His heirs were his widow, Frances Nicolls, and a number of nephews and nieces. Upon the nomination of the widow, W. R. Rogers was appointed administrator of the estate.

Included in the estate was a lot, with a dwelling thereon, in the city of San Diego. The widow petitioned to have this property set apart to her as a homestead. Objections were filed by various other heirs. After a hearing, the court made its order setting said property apart as a homestead and vesting it absolutely in the widow. The contesting heirs appeal from the order and from a subsequent order denying their motion for a new trial.

The order setting apart the homestead contained findings that no homestead had been selected and recorded during the lifetime of the decedent, and that the property involved was community property. The latter finding is attacked as unsupported by the evidence. That the finding is material is not to be questioned. Where no homestead has been selected during the lifetime of the decedent, the court in probate, in setting apart a homestead from the separate property of the decedent, can set it apart for a limited period only. Under the provisions of the Code of Civil Procedure, as originally enacted, the power of the court was not so restricted. (*Mawson v. Mawson*, 50 Cal. 539). Section 1468 was, however, amended in 1881 [Stats. 1881, p. 8], by the addition of this clause: "If the property set apart be a homestead, selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order." The added provision might seem, at first glance, to refer to the case of property which had been selected as a homestead during the lifetime of the decedent. It is, however, settled by the decisions of this court that this is not its proper construction. The new clause applies to homesteads set apart in probate proceedings, no homestead having been theretofore selected. Its effect, as to such cases, is to alter the rule declared in *Mawson v. Mawson*, 50 Cal. 539, and to take from the court the power to assign a homestead absolutely except where the property set apart is community property. (*In re Schmidt*, 94 Cal. 334, [29 Pac. 714]; *Lord v. Lord*, 65 Cal. 84, [3 Pac. 96]; *In re Noah*, 73

Cal. 590, [2 Am. St. Rep. 834, 15 Pac. 290] ; *In re Lahiff*, 86 Cal. 151, [24 Pac. 850].)

We think the appellants are clearly right in their contention that the finding of the community character of the property in question is not supported by the evidence. It is undoubtedly the rule that all property acquired by either spouse during the existence of the marriage is presumed to be community property, and that the burden of overcoming the presumption by clear and satisfactory evidence rests upon the party claiming that the property is separate. (*Smith v. Smith*, 12 Cal. 216; *Althof v. Conheim*, 38 Cal. 230, [99 Am. Dec. 363] ; *Davis v. Green*, 122 Cal. 364, [55 Pac. 9].) Here, however, the evidence regarding the acquisition of the property was without substantial conflict, and giving it the strongest possible construction in favor of the respondent, it pointed indisputably to the conclusion that the house and lot in controversy were not community property.

Robert Niccolls, the decedent, and Frances Niccolls, the respondent, were married in Pennsylvania in 1854. Shortly after their marriage they took up their abode in Bloomington, Illinois, and resided there until 1881 or 1882, when they moved to San Diego, in this state, where they remained until the husband's death. Testimony with respect to their property before and after marriage was given by Mrs. Niccolls. Concerning some details there was more or less uncertainty in her testimony. This was due, no doubt, as the witness herself said, to a slight impairment of memory—a condition which was not surprising in view of her advanced age and the length of time that had elapsed since the events of which she was speaking. But, taking her testimony in its aspect most favorable to her, it appears that, at the time of the marriage, Mrs. Niccolls owned real estate in the state of Illinois, of the value of five thousand dollars. Her husband also owned some property. With the proceeds of the property of both, the husband purchased land in Illinois. From 1854 to 1860 or 1861, the husband, who was a physician, practiced his profession. From 1861 to 1865, the period of the Civil War, he was attached to the forces of the United States as an army surgeon, in which capacity he earned a fixed salary. After the war, he resumed his residence in Bloomington. He did not again engage in medical practice, but

occupied himself with buying and selling land, and loaning money, generally on mortgage security. The capital employed in these ventures was made up of the proceeds of the property which his wife had owned before marriage, together with the property which he had owned and his subsequent earnings. No distinction was made between the husband's property and that belonging to his wife. All was handled and controlled by the husband. As Mrs. Niccolls expressed it, "everything was his and everything was mine. . . . I expected him to do what was right." When the couple moved to California, Dr. Niccolls brought with him a part of the accumulations he had thus made, and with this he acquired the property in controversy and a ranch in San Diego County. He never practiced his profession in California, nor did he follow any other occupation in this state. The character of the property owned by himself and his wife did not, therefore, change after they had taken up their residence in San Diego.

The question, then, is what, according to the law of the state of Illinois, was the character of the property owned and acquired by Dr. and Mrs. Niccolls in that state, and by them brought to California. "If a husband and wife acquire personal property in one state and then remove with the same into a state in which the community law prevails, the law of the state where they lived when the property was acquired will govern as to whether it be separate or community property." (Ballinger on Community Property, sec. 47; *Kreamer v. Kreamer*, 52 Cal. 302; *Estate of Burrows*, 136 Cal. 113, [68 Pac. 488].) The record before us contains testimony, which is uncontradicted, that "there is not in the state of Illinois, by statute or as common law, any such thing as community property, whereby the husband and wife both have a community interest in property accumulated during the marriage relation." It follows that the property accumulated during the marriage, whatever might have been its character if the parties had acquired it while domiciled in California, was not community property in Illinois. Consequently neither it, nor any property for which it was exchanged, became community property in this state. It was either the property (separate) of the husband, or of the wife, or it belonged to both in proportion to their respective

contributions thereto. But neither of these conditions justifies the finding that it was community property.

It is claimed by the respondent that the accumulations of the spouses were the product of the property owned by her before marriage, and thus constituted her separate property. From this premise she argues that she was entitled to the house and lot in any event, and that the appellants are not injured by the order which merely sets apart to her her own property. There are two answers to this position. In the first place, the evidence does not compel (if, indeed, it would permit) the conclusion that all the property was the separate property of the wife. The court has not found that it was. On the contrary, the finding is that it was community property, and we cannot support the order based on this finding by supposing that the court might, or would, have found that it was separate property of the wife. But, beyond this, a finding that the house and lot were separate property of the wife would not have justified the order setting apart a homestead. In making such order, the court is dealing only with the property of the estate. It has no jurisdiction, in a proceeding of this character, to determine the title to the property, or the validity of any claim of title adverse to that of the estate. (*Estate of Burton*, 64 Cal. 428, [1 Pac. 702]; *Estate of Groome*, 94 Cal. 69, [29 Pac. 487]; *Estate of Kimberly*, 97 Cal. 281, [32 Pac. 234].) "It determines, merely, that the parcel named is selected from the estate of the deceased (whatever his interest therein may have been) and who are the persons entitled to the benefit of the homestead selection. . . . Title to real estate cannot be tried in such proceeding." (*Estate of Burton*, 64 Cal. 428, [1 Pac. 702].) The application of the respondent was, therefore, necessarily based upon the theory that the house and lot in question was a part of the estate of the decedent. She was invoking the power of the court to set apart to her the interest which the decedent had owned—whether as community or his separate estate—in the property. Any title that she might claim in it as her separate property was not involved and could not be adjudicated.

The appellants do not object to the assignment of this property to the widow as a homestead. They complain merely of the provision that sets it apart to her absolutely.

They suggest that the order be modified so as to limit the homestead right to the life of respondent. This concession obviates the necessity of a new trial, and we think the course suggested a proper one.

The order setting apart the homestead is reversed, with directions to the court below to modify the same by striking therefrom in the paragraph preceding the description of the property the words "and is hereby vested absolutely in said widow," and substituting therefor the words "during her lifetime." The order denying a new trial is affirmed.

Shaw, J., and Angellotti, J., concurred.

[L. A. No. 2987. Department One.—December 20, 1912.]

RAY L. PUGH et al., Respondents, v. J. MOXLEY et al.,
Defendants and Respondents; F. M. RYON, Defendant
and Appellant.

MECHANICS' LIENS—MORTGAGE EXECUTED AFTER COMPLETION OF BUILDING—PRIORITY OF LIENS.—Except as given priority by the provisions of section 1188 of the Code of Civil Procedure, a mortgage of land upon which buildings had been erected, made after the completion of the buildings, and, therefore, after the work was done and materials commenced to be furnished, is subordinated, by section 1186 of that code, to the liens of mechanics and materialmen.

ID.—LIEN AGAINST TWO BUILDINGS—STATEMENT OF SPECIFIC AMOUNTS CLAIMED—BUILDINGS ERECTED UNDER SINGLE CONTRACT.—Section 1188 of the Code of Civil Procedure, requiring the claimant who files a lien against two or more buildings, or other improvements, to designate the specific amount for which he claims a lien upon each of such improvements, does not require him to make such designation unless there is in fact a specific amount due to him on each of such improvements. The section does not require separate statements of the amount due on each building or improvement, where two or more buildings or improvements are constructed under a single contract for a single consideration.

ID.—FURNISHER OF MATERIALS WHEN CONTRACTOR OR MATERIALMAN—RELATIVE VALUE OF MATERIALS AND LABOR.—In determining whether a lien claimant is a "contractor" or a "materialman" within the purview of the Mechanics' Lien Law, the test of the character of

the contract is the relative value of the material and the labor supplied. If the value of the labor is small in comparison with that of the material, the claimant is a materialman.

Id.—COST OF LABOR SMALL IN COMPARISON WITH VALUE OF MATERIALS.—

One furnishing and installing fixtures and other materials for a building is to be deemed a materialman when the value of the goods supplied was nine hundred and fifty dollars, while the labor cost was only \$128. The same is true of one furnishing lumber, in connection with which the only element of labor cost was a comparatively trifling amount for cartage.

Id.—REASONS OF DECISION—DICTUM.—Where a decision is based upon two independent lines of reasoning, neither one can be said to be *dictum*. One is as necessary to the decision as the other.

APPEAL—ERRONEOUS FINDING WITHOUT PREJUDICE IF DISREGARDED BY JUDGMENT.—Any error in finding against an appellant on a particular issue is without prejudice to him, if the judgment gave him all relief to which he was entitled had the finding been in his favor.

APPEAL from a judgment of the Superior Court of Riverside County and from an order refusing a new trial. F. E. Densmore, Judge.

The facts are stated in the opinion of the court.

Purington & Adair, for Appellant.

M. Estudillo, Patterson Sprigg, Collier, Carnahan & Craig, Thomas T. Porteous, and C. L. McFarland, for Respondents.

SLOSS, J.—A number of actions for the foreclosure of mechanics' liens were consolidated, and judgment in favor of the claimants was entered. The defendant Ryon, asserting an interest as mortgagee, appeals from the judgment and from an order denying his motion for a new trial.

In 1909, Mrs. O. E. Moxley, acting through her husband, J. Moxley, as agent, commenced the construction of two dwelling-houses upon a parcel of land, owned by her, in the city of Riverside. There was no contract for the erection of the buildings, or either of them, as a whole. J. Moxley made contracts with laborers and others for the doing of work and the furnishing of materials, the construction being superintended by him personally. The buildings were completed on November 27, 1909. On December 7, 1909, the appellant,

Ryon, loaned the Moxleys eight thousand dollars, taking a mortgage on the two houses, and the land on which they were situated, as security. The various lien claimants filed their respective claims within the time allowed by the statute. The owners defaulted. Ryon answered and filed a cross-complaint, in which he asked that his mortgage be foreclosed, and that the lien of said mortgage be declared to be prior to that of the claimants of mechanics' liens. The decree postponed the mortgage to the mechanics' liens. The several points made by the appellant are as follows:

1. It is urged that the provisions of section 1188 of the Code of Civil Procedure give the mortgage priority over the other liens. As the mortgage here involved was made after the completion of the buildings, and, therefore, after the work was done, and materials commenced to be furnished, it was subordinate to the liens of mechanics, etc. (Code Civ. Proc., sec. 1186), unless given a superior standing by the provisions of section 1188. That section reads as follows: "In every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must at the same time designate the amount due to him on each of such buildings, mining claims, or other improvements; otherwise, the lien of such claim is postponed to other liens. . . ." In the case at bar it appears that each of the claimants made a single and entire contract with J. Moxley for the doing of work or the furnishing of materials on both buildings for an agreed lump sum, or for a sum to be fixed in accordance with the amount of work done and materials furnished (for example, eleven cents per square foot for certain cement work).

If the question were a new one, there might be some doubt whether claims of lien under such contracts are subject to the requirements of section 1188. But there is authority to the effect that the section has no application to work done or material furnished under the circumstances here disclosed. In *Warren v. Hopkins*, 110 Cal. 506, [42 Pac. 986], the court said: "While section 1188 requires the claimant who files a lien against two or more buildings, or other improvements, to designate the specific amount for which he claims a lien upon each of such 'improvements,' it does not require him to make such designation unless there is in fact a specific

amount due to him on each of such improvements, and it might frequently happen that a contractor would construct several buildings under one contract, and there would not be any specific amount due to him on each of such buildings." The district court of appeal for the third appellate district has held to the same effect in *Southern Cal. Lumber Co. v. Peters*, 3 Cal. App. 478, [86 Pac. 816]. (See, also, *Kritzer v. Tracy Eng. Co.*, 16 Cal. App. 287, [116 Pac. 700].) It is contended by appellant that the foregoing quotation from the opinion in *Warren v. Hopkins* is to be disregarded as *dictum*. It is true that the opinion in question states, as a ground of decision, that section 1188 does not apply to the particular character of improvement (grading of lots) involved in that case. But the court did not rest its conclusion upon this ground alone. It went on to express the view that, if section 1188 were to be held to be applicable, the result would not be different, for the reason that the section, upon a proper construction of its terms, does not require separate statements of the amount due on each building or improvement, where two or more buildings or improvements are constructed under a single contract for a single consideration. Where a decision is based upon two independent lines of reasoning, neither one can be said to be *dictum*. One is as necessary to the decision as the other. (*Clary v. Rolland*, 24 Cal. 147; *Camron v. Kenfield*, 57 Cal. 551; *King v. Pauly*, 159 Cal. 554, [Ann. Cas. 1912C, 1244, 115 Pac. 210].) *Warren v. Hopkins* was decided in 1895. The correctness of the views there expressed has never been questioned by this court. It is fair to assume that many lien claimants, including, it may be, the respondents in the case at bar, have relied upon that decision in framing their notices of lien. Under these circumstances, we should not be disposed to alter the rule laid down, even if we felt much more doubtful than we do of the soundness of the construction heretofore declared. It must, therefore, be held that the court below did not err in giving to the liens of the respondents priority over the mortgage lien.

2. Two of the claims are attacked on the ground that they were based on original contracts for more than one thousand dollars, and that such contracts were void, because not reduced to writing, or filed for record, as required by section

1183 of the Code of Civil Procedure. One of these contracts was that of the Hinde Hardware Company. By its terms the Hardware Company agreed with J. Moxley to do all the work and furnish all materials and fixtures necessary to install two solar heaters, two bath tubs, two toilets, two pair laundry trays, two wash basins, and two kitchen sinks, with the necessary connecting pipes, for the sum of \$1,078. The other was a contract whereby the Russ Lumber and Mill Company agreed to furnish to Moxley lumber and building materials for the two houses, as required from time to time, at current market prices. Goods were furnished to the amount, including cartage, of \$2,137.70. The court found that neither of these contracts was an original contract within the meaning of section 1183, but that each was a contract for the sale of materials to be used in the construction of the buildings. If this finding is sustained by the evidence, the conclusion that the contracts, whatever the amount payable under them, were not required to be in writing or filed for record, necessarily followed. (*Hinckley v. Fields' Biscuit etc. Co.*, 91 Cal. 136, [27 Pac. 594]; *Roebbling's Sons Co. v. Humboldt etc. Co.*, 112 Cal. 288, [44 Pac. 568]; *Bennett v. Davis*, 113 Cal. 337, [54 Am. St. Rep. 354, 45 Pac. 684]; *Bryson v. McCone*, 121 Cal. 154, [53 Pac. 637]; *California Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 692, [118 Pac. 103, 113].) "It is quite clear to us," says the court in *Hinckley v. Fields' Biscuit etc. Co.*, 91 Cal. 136, [27 Pac. 594], "that the word 'contractor' in sections 1183 and 1184 of the Code of Civil Procedure does not refer to a materialman." On the other hand, one may be an original contractor although he has agreed to do only a part of the work required for the construction of a building. (*La Grill v. Mallard*, 90 Cal. 373, [27 Pac. 294]; *Pacific Mut. L. Ins. Co. v. Fisher*, 106 Cal. 224, [39 Pac. 758]; *Smith v. Bradbury*, 148 Cal. 41, [113 Am. St. Rep. 189, 82 Pac. 367].) The line of demarcation may be illustrated by a brief reference to the facts of some of the cases we have cited. One who agrees to manufacture, at his own works, and to install in the building of another, a steam-plant, consisting of boilers, engine, and attachments, is a materialman, and not an original contractor. (*Hinckley v. Fields' etc. Co.*, 91 Cal. 136, [27 Pac. 594].) The same is true of one who agrees to furnish and set up, ready for use, electrical machinery (*Roebbling's Sons Co. v. Humboldt etc. Co.*,

112 Cal. 288, [44 Pac. 568]; or one who contracts to furnish mantels, tiles, and grates, and perform the labor necessary to install them in a building (*Bennett v. Davis*, 113 Cal. 337, [54 Am. St. Rep. 354, 45 Pac. 684], or to furnish and put in place a plant for the manufacture of ice (*Bryson v. McCone*, 121 Cal. 154, [53 Pac. 637]), or to furnish and install elevators (*California Portland Cem. Co. v. Wentworth Hotel Co.*, 16 Cal. App. 692, [118 Pac. 103, 113].) But contracts to paper and decorate rooms (*La Grill v. Mallard*, 90 Cal. 372, [27 Pac. 294]), or to do the plastering work, including labor and materials, in a building (*Smith v. Bradbury*, 148 Cal. 41, [113 Am. St. Rep. 189, 82 Pac. 367]), are original contracts. The test of the character of the contract is the relative value of the material and the labor supplied. If the value of the labor is small in comparison with that of the material, the claimant is a materialman. (*Bennett v. Davis*, 113 Cal. 137, [54 Am. St. Rep. 354, 45 Pac. 684].) Applying this ground of discrimination, the evidence was clearly such as to justify the finding that the Hinde Hardware Company and the Russ Lumber and Mill Company were materialmen, and not original contractors. In the case of the former the value of the fixtures and other material supplied was nine hundred and fifty dollars, while the labor cost was only \$128. The only element of labor connected with the furnishing of lumber by the Russ Company was cartage, which was trifling in comparison with the value of the materials.

3. The appellant, Ryon, alleged in his cross-complaint that the Moxleys had violated a covenant of their mortgage requiring them to keep the buildings insured for the benefit of the mortgagee, and that he had been compelled to insure, expending \$116 as a premium for such insurance. He prayed for foreclosure of his mortgage, including the \$116 as a part of the debt secured. The court found that the payment of the premium was voluntary on Ryon's part. This finding is assailed as contrary to the evidence. But since the court, notwithstanding the finding, gave to the appellant the relief which he asked, and included the sum of \$116 in the amount to be paid him out of the proceeds of a sale, he is not in any way injured by the error, if error there was, in finding against him on this point. (Code Civ. Proc., sec. 475.)

The objection to the finding that the mortgage is subsequent to the liens of the respondents is sufficiently answered by what has been said on the first point discussed in this opinion.

4. The appellant excepted to the admission in evidence, over his objection, of the claims of lien of the several respondents. The ground of objection was that the amount claimed as against each of the buildings was not separately stated. As we have already seen, no such separate statement was required. But even if it had been, the defect would merely have affected the priority of the liens. It would have been no ground for refusing to admit them in evidence.

No other points are made.

The judgment and the order denying a new trial are affirmed.

Shaw, J., and Angellotti, J., concurred.

[S. F. No. 5896. Department Two.—December 20, 1912.]

E. W. NEWHALL, Respondent, v. WESTERN ZINC MINING COMPANY (a Corporation), Respondent; I. W. LEVY (a stockholder of the said Corporation), Appellant.

CORPORATION—NONPAYMENT OF LICENSE-TAX—FORFEITURE OF CHARTER—TERMINATION OF EXISTENCE—NONLIABILITY TO SUIT—VOID JUDGMENT—STOCKHOLDER MAY AVOID.—A corporation organized under the laws of California for profit, whose franchise and charter have been forfeited for noncompliance with the act of March 20, 1905, requiring the payment of an annual license-tax, ceases to have a corporate existence and cannot be sued, and a judgment obtained against it is void and may be impeached at the instance of a stockholder therein, who intervenes in the action in which the judgment was rendered for the purpose of expunging it from the records.

ID.—JUDICIAL DETERMINATION NOT ESSENTIAL TO FORFEITURE.—The forfeiture provided for by that act is not dependent upon judicial determination and decree, but is self-acting and operating.

ID.—SHOWING BY STOCKHOLDER—ACCEUAL OF CORPORATE LIABILITY—CORPORATE ASSETS.—In such intervention proceeding by the stockholder, it is not necessary that he should show that he was a stock-

holder at the time the liability upon which the judgment was obtained against the corporation accrued, nor the fact that the corporation had assets.

ID.—ESTOPPEL BY STOCKHOLDER—ANSWER BY FORMER DIRECTOR.—Such stockholder is not estopped from complaining of such judgment, by reason of the fact that one of the former directors of the defunct corporation, who became under the provisions of that act the trustees to wind up its corporate affairs, filed an answer in the action admitting the corporate existence of the defendant.

ID.—DIRECTORS AS TRUSTEES OF CORPORATION—CANNOT ANSWER IN NAME OF CORPORATION.—Such act authorizes the directors, and not one of them, to act as trustees. It empowers them as trustees to sue and be sued but not to answer suits in the name of the defunct corporation.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing to set aside a judgment. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Joseph C. Meyerstein, for Appellant.

Thomas, Gerstle, Frick & Beedy, and Thomas, Frick & Beedy, for Plaintiff and Respondent.

Francis V. Keesling, for Defendant and Respondent.

HENSHAW, J.—On the fourth day of March, 1909, plaintiff, as assignee of certain claims for goods sold and delivered to the Western Zinc Mining Company, a corporation, commenced his action against this corporation upon these claims. The complaint was verified and contained the usual and appropriate averment of the corporate existence and capacity of the defendant. On the twenty-fourth day of March, 1909, what purported to be the answer of the corporation was filed. This answer was verified by one P. A. Brangier, declaring himself to be a director of the defendant. The answer admitted, by failing to deny, the averment in the complaint touching the corporate capacity of the defendant. Subsequently the action was tried by the court sitting without a jury, and on the eighth day of April, 1910, the court gave judgment in favor of the plaintiff and against the defendant

for the sum of \$24,193.80. On the twenty-sixth day of September, 1910, I. W. Levy entered his appearance in the action and gave notice of his intended motion to set the judgment aside. The motion was made and was by the court denied. In support of the motion it is established by affidavit of the moving party that he was during all the period of time involved in the action and still is a stockholder of the defendant corporation; that the corporation was organized and had existed under the laws of the state of California as a corporation for profit; that the corporation had not paid the annual license-tax required by law to be paid by such corporations for the fiscal year commencing July 1, 1908, and that on the thirtieth day of November, 1908, it had forfeited its charter to the state and had ceased to exist as a corporation.

None of these facts is controverted or denied. I. W. Levy, the moving party and appellant herein, contends upon these admitted facts that it was the clear duty of the court to have granted his motion. That a corporation whose charter has been forfeited cannot be sued, that a judgment obtained against such corporation is void and may be impeached at the instance of a stockholder of such corporation, are legal propositions conclusively settled in favor of appellant's contention by *Crossman v. Vivienda Water Co.*, 150 Cal. 575, [89 Pac. 335]. True that in the Crossman case there had been a dissolution of the corporate existence by judicial decree. But there can be no legal distinction between such a termination of corporate existence and the termination by forfeiture of franchise and charter under the act of March 20, 1905, and the amendments thereto. For that act clearly and unmistakably declares and provides for a forfeiture not dependent upon judicial determination and decree, but a forfeiture which is self-acting and operating. The language of the act does not even permit a doubt upon this question. It not only declares the day and the hour when the forfeiture shall arise, but it makes it a penal offense for any officer or agent thereafter to exercise any corporate powers on behalf of the corporation and, finally, it provides that the winding up of the corporate affairs is imposed upon the directors or managers of the corporation who "are deemed to be trustees of the corporation and stockholders or members of the corporation whose power or right to do business is forfeited." These

trustees and not the corporation may sue or "may be sued in any of the courts of this state by any person having a claim against said corporation."

As little doubt can be entertained of the stockholder's right to intervene for the purpose of expunging from the records such a void judgment against the corporation. Respondents urge that in this instance the stockholder does not show that he is a party interested, or, if interested, that his interests are liable to injury by reason of the judgment. In this respect it is argued that the stockholder does not show that he was a stockholder at the time that the liability upon which the judgment was obtained against the corporation accrued, and that if he were not a stockholder at such time no stockholder's liability was cast upon him. Further, that an execution upon the judgment had been returned unsatisfied, and it is said that the stockholder has failed to show by his affidavit that the corporation has acquired any assets since the date of the entry of the judgment. But in answer to this, suffice it to say that it was not incumbent upon the stockholder to show any of these things, any more than it was incumbent on him to plead the negative of an estoppel. A stockholder is interested in any judgment obtained against his corporation, and that interest is not dependent upon his stockholder's liability for that judgment, nor upon the existence or nonexistence of corporate assets. Even if the judgment could not be made the basis of proceedings against the stockholder, it would serve to reduce the assets of the corporation, and consequently the value of the stockholder's shares if at any time the corporation should acquire assets.

We can perceive no force to the argument that the appellant is estopped from complaining of the judgment. Herein it is said that as the directors are made trustees of the defunct corporation, and as the corporate answer was filed by one of these directors or trustees, it results that the stockholder's own trustee filed the answer in this case and that this director or trustee having defended the action and having admitted the corporate existence of the defendant, the stockholders are bound by this action. But to this it must be replied that the law authorizes the directors, and not one of them, to act as trustees. It empowers them as trustees to sue and be sued, but not to answer suits in the name of the defunct corpora-

tion. Brangier's answer was, therefore, not only without authority of law, but in direct violation of the law. And, finally, if, notwithstanding these plain violations of the law, assent be given to the statement of respondent that "the business of the Western Zinc and Mining corporation was continued by defending this suit in its name, it must inevitably result that the trustee who thus did continue the business of the Western Zinc Mining Company not only did so in violation of his powers and of the express mandate of the statute, but made himself criminally liable for his conduct, under section 9 of the amended act.

The order appealed from is, therefore, reversed.

Melvin, J., and Lorigan, J., concurred.

[L. A. 2956. Department One.—December 23, 1912.]

O. A. VICKREY and B. L. VICKREY, Appellants, v.
SIMON MAIER and JOHN T. JONES, Respondents.

WRITTEN CONTRACT—PRESUMPTION OF CONSIDERATION.—Under the presumption in favor of written agreements, as provided by section 1614 of the Civil Code, in the absence of proof to the contrary, an adequate consideration must be presumed to have passed at the execution of such a contract, and, if necessary, it will be assumed that it consisted of something of value not mentioned in the agreement itself, unless the terms of the agreement are such as to exclude or forbid such assumption.

ID.—RECIPROCAL PROMISES OF PARTIES TO CONTRACT.—A promise by one party may be a sufficient consideration for the promise of another, and where there are mutual or reciprocal promises in a written agreement each constitutes a consideration for the other, particularly where it is expressly so declared.

ID.—PROMISE OF PREFERENTIAL RIGHT TO PURCHASE STOCK—AGREEMENT TO BUY STOCK AT STATED PRICE AT SELLER'S OPTION.—An agreement by the plaintiffs that if they chose to sell certain stock in a corporation they would give the defendants a preferred right to buy it over all other purchasers, is a sufficient consideration to support the agreement of the latter to pay dividends on the stock and also to buy it, at the plaintiff's option, at any time after six months, on ninety days' notice, at a stated price.

Id.—OBLIGATION TO PURCHASE—ELECTION TO SELL—NOTICE OF ELECTION—OFFER OF DELIVERY.—Such an agreement imposed no obligation on the defendants to buy the stock at the price stated, unless the plaintiffs elected to sell it, and gave the notice, nor, even after such election and notice, until they had offered to deliver the stock in pursuance of the agreement.

Id.—ACTUAL DEMAND NECESSARY TO RIGHT OF ACTION—STATUTE OF LIMITATIONS.—The general rule is, that where an actual demand is essential as a condition precedent to a complete right of action for the recovery of money, such demand must be made within a reasonable time after it can lawfully be made, or within a reasonable time after the contract by its terms contemplates that it should be made, and that, unless there are peculiar circumstances affecting the question, a time coincident with that of the statute of limitations, will be deemed reasonable.

Id.—ACTION TO RECOVER STATED PRICE—DEMAND AND TENDER OF PERFORMANCE—COMMENCEMENT OF RUNNING OF STATUTE.—An action to recover such stated price is in effect an action to enforce performance of a contract to buy personal property, and it is governed, so far as the commencement of the running of the statute of limitations is concerned, by the same rule which controls in the case of a sale of real property. Such rule is, that where a party may call for the performance of the agreement upon the part of another only by a tender or offer to perform his own agreement, there can be no breach of the contract by the one until such offer or tender by the other, and the statute will not begin to run until that time.

Id.—DEMAND FOR PERFORMANCE—NOTICE OF ELECTION TO SELL—LACHES. Where such agreement of purchase was in writing, and the plaintiffs, within four years after its execution, set in motion proceedings for a demand for performance by the defendants and made the actual demand within a few months thereafter, they were not guilty of laches sufficient to bar their action to recover the price stated.

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Monroe, Judge.

The facts are stated in the opinion of the court.

Alton M. Cates, and Stewart & Stewart, for Appellants.

James P. Clark, and Mott & Dillon, for Respondents.

SHAW, J.—Appeal from the judgment on the judgment-roll alone.

The complaint is in three counts upon three contracts of similar form. The first is dated November 14, 1905, and is for the sale of ten shares of the Maier Packing Company, a corporation, at five thousand dollars, the second and third are dated, respectively, August 20 and November 10, 1906, the second being for twenty shares of said stock at ten thousand dollars, and the third for thirty shares at fifteen thousand dollars. A consideration of the first contract will be determinative of all questions presented except that of the statute of limitations.

On November 14, 1905, plaintiffs subscribed for the ten shares of stock and paid five thousand dollars to said company therefor, that being the par value. The shares were issued to them on February 20, 1906, and they have ever since held and owned the same. Upon the date they subscribed the plaintiffs and defendants executed a written agreement as follows:

"THIS AGREEMENT made and entered into this 14 day of November, 1905, by and between SIMON MAIER and JOHN T. JONES, parties of the first part, and O. A. and B. L. VICKREY party of the second part.

"WITNESSETH: That whereas said second party has subscribed for 10 shares of the capital stock of the MAIER PACKING Co., a corporation, the first parties are desirous of securing the first right to purchase said stock, in the event second party may desire to sell the same.

"NOW THEREFORE said second party agrees that, before offering said stock for sale, he will first notify first parties and give them the first right to buy the same at the price offered by any *bona fide* intending purchaser. In consideration of which said first parties agree and obligate themselves to pay or cause to be paid to second party, a dividend of six per cent per annum on said stock, payable quarterly, and that at any time after six months from date hereof on ninety days notice, they will purchase said stock at the price paid therefor and six per cent per annum from date of payment of last dividend, but the party of the second part shall not be obligated to sell said stock at the price paid therefor."

Dividends of six per cent per annum were regularly paid by said company on said stock down to and including the quarterly dividend due on July 3, 1909. In each of the last

two counts, the date "July 3, 1909," is, by what is obviously a clerical error, written July 3, 1910. We attach no importance to this misprision and disregard it entirely. No other dividends have been paid on the stock. On March 4, 1910, the plaintiffs gave to the defendants the following notice:

"MESSRS. SIMON MAIER AND JOHN T. JONES,

"Gentlemen:

"In accordance with the provisions contained in three certain agreements between yourselves upon the one part and the undersigned upon the other of date of November 14, 1905, August 20, 1906, and November 10, 1906, respectively, at which times the undersigned purchased from the Maier Packing Company, a corporation, ten (10), twenty (20), and thirty (30) shares of its capital stock respectively, making a total purchase of sixty (60) shares of the capital stock of said Maier Packing Company for the sum of thirty thousand (\$30,000) dollars, we request and demand that you carry out the provisions of said agreements and each thereof, by paying or causing to be paid to the undersigned all dividends now in arrears upon said stock at the rate of six (6) per cent per annum, payable quarterly, and we further request and demand that you comply with the provisions of said agreements and each thereof by purchasing on or before ninety (90) days from date hereof, said sixty (60) shares of stock and paying us therefor the price paid for the same, to wit, the sum of \$30,000, and in addition thereto all said sums now unpaid on account of dividends."

On September 12, 1910, plaintiffs tendered to defendants the said shares of stock and demanded that the defendants should pay to plaintiffs the price paid by the plaintiffs therefor, to wit, five thousand dollars, and the further sum of \$355.67 as interest on the five thousand dollars, from the date of payment of said last paid dividend to the date of the demand. The defendants refused and still refuse to perform said agreement of November 14, 1905, and have not paid said sums or any part thereof. The prayer of the complaint is for judgment for \$32,134.01, being the aggregate amount demanded upon the three contracts, including purchase price and dividends unpaid. The action was begun on the day of the tender and immediately thereafter.

The only defenses alleged in the answer are that there was no consideration for the agreements sued on, and that the action is barred by the provisions of section 337 of the Code of Civil Procedure prescribing four years as the period of limitation. No evidence was offered in support of either of the defenses, and the plaintiff offered no evidence to prove a consideration. Upon the foregoing facts the court below gave judgment for the defendants.

The complaint states facts sufficient to constitute a cause of action. The agreement bound the defendants to perform two things: 1. To pay or cause to be paid, quarterly, a dividend on the stock at the rate of six per cent per annum; 2. To repurchase the stock at the price which the plaintiffs had paid therefor, with interest from the date of the payment of the last dividend. No dividend has been paid for the year beginning July 3, 1909. The dividends for that year on the ten shares of stock covered by the first contract amounted to three hundred dollars. The defendants had agreed to pay this sum to plaintiffs and had failed to do so, although it was past due. It was a direct undertaking for the payment of money, and upon a breach thereof they were immediately liable. The plaintiffs were therefore, at least, entitled to recover the amounts of the quarterly dividends on all the stock, due and remaining unpaid at the time the action was begun.

There is no merit in the claim that the agreement was without consideration. Under the presumption in favor of written agreements, as provided by section 1614 of the Civil Code, in the absence of proof to the contrary, an adequate consideration must be presumed to have passed, and, if necessary, we must assume that it consisted of something of value not mentioned in the agreement itself, unless the terms of the agreement are such as to exclude or forbid such assumption. If the contract had not recited any consideration, the fact that it was in writing would, therefore, be sufficient evidence thereof. But the agreement, on its face, shows a consideration. It is a well established rule of the law of contracts that a promise by one party may be a sufficient consideration for the promise of another, that where there are mutual or reciprocal promises in a written agreement each constitutes a consideration for the other, particularly where it is expressly so declared. (*Gallagher v. Equitable*

etc. Co., 141 Cal. 707, [75 Pac. 329]; *Van Loben Sels v. Bunnell*, 120 Cal. 682, [53 Pac. 266]; 1 Parsons on Contracts, *p. 449; 1 Page on Contracts, sec. 296; 1 Beach on Contracts, sec. 178.) Here the plaintiffs agreed that if they chose to sell the stock they would give the defendants a preferred right to buy it over all other purchasers. The defendants deemed this a valuable thing, and in consideration therefor they agreed to pay dividends on the stock and also to buy the stock at plaintiffs' option at any time after six months, on ninety days' notice, at a stated price. Under the authorities there was a sufficient consideration.

The remaining question is that of the statute of limitations so far as the action proceeds for the recovery of the price agreed to be paid for the stock. The action was begun on September 12, 1910. With regard to the second and third contracts, dated respectively, August 20, 1906, and November 10, 1906, it is clear that the four year period of limitation had not expired at the time the action was begun. The third contract was made less than four years prior to the beginning of the action. The second contract was made more than four years before that date, but the six months therein specified as the earliest date at which the repurchase could be demanded did not expire until February 20, 1907. Under no circumstances could the cause of action upon this contract have accrued until the latter date, and it was less than four years before the action was begun.

The claim that the first contract is barred is based on the theory that the demand for the repurchase was made after the statutory period had run. The general rule is that where an actual demand is essential as a condition precedent to a complete right of action for the recovery of money, such demand must be made within a reasonable time after it can lawfully be made, or within a reasonable time after the contract by its terms contemplates that it should be made, and that, unless there are peculiar circumstances affecting the question, a time coincident with that of the statute of limitations, will be deemed reasonable. (*Thomas v. Pacific B. Co.*, 115 Cal. 142, [46 Pac. 899]; *Williams v. Bergin*, 116 Cal. 60, [47 Pac. 877]; *Meherin v. San Francisco Produce Exch.*, 117 Cal. 217, [48 Pac. 1074; *Bills v. Silver K. M. Co.*, 106 Cal. 21, [39 Pac. 43], concurring opinion of Beatty, C. J.)

It is argued that the ninety days' notice, under the terms of the contract, could have been given ninety days prior to the expiration of the first six months, that is, on February 13, 1906, so as to make performance demandable on May 14, 1906, and that to delay giving such notice until March 4, 1910, which was more than four years after it might have been given, brings the case within the rule above stated. It is also suggested that, even if the ninety days' notice was not to be given prior to May 14, 1906, the plaintiffs, by giving it on that date, could have made the contract enforceable and a demand possible on August 12, 1906, and that giving the notice within the four years thereafter does not save them from the consequences of their laches, for the reason that they did not make any tender or demand until September 12, 1910, which was beyond the limit of four years from the time when they might lawfully have made it, if they had been prompt to assert their rights.

It may be conceded, though we do not say it, that these arguments would be sound if the rule in question were applicable to cases of the character here presented. We do not think it applies to this case. The cases cited were all for the payment of money, simply, and the money was positively owing and would become due and payable upon a mere demand by the payee. We have found no case where the doctrine has been applied to a contract for the purchase and sale of property at a fixed price, at the option of the seller. Here there was no positive obligation to pay money. There was no obligation at all unless the plaintiffs elected to sell the stock, and gave the notice, nor, even after such election and notice, until they had offered to deliver the stock in pursuance of the agreement. This case is in effect an action to enforce performance of a contract to buy personal property. We see no reason why it should be governed by a different rule from that which controls in the case of a sale of real property. The rule is thus stated: "Where a party may call for the performance of the agreement upon the part of another only by a tender or offer to perform his own agreement, there can be no breach of the contract by the one until such offer or tender by the other, and the statute will not begin to run until that time." (25 Cyc. 1210.) This statement is supported by the authorities cited to the text. (*Oaks v.*

Taylor, 30 App. Div. 177, [51 N. Y. Supp. 775; *Deming v. Haney*, 23 Iowa, 77; *Hall v. Felton*, 105 Mass. 516; *Iron R. Co. v. Fink*, 41 Ohio St. 321, [52 Am. Rep. 84].)

Furthermore, the contract shows by its terms that performance at the expiration of the six months was not of its essence. The circumstances show that some delay was contemplated. The plaintiffs had the option which they could exercise "at any time after" the six months. It was obviously expected that events occurring after the six months might determine their choice. That period was named to prevent them from demanding a repurchase earlier, not to fix a limit upon the time after its expiration within which they might make the election. Even in cases involving contracts for the payment of money, if the contract shows by its terms that the right to demand it is to endure for a considerable period, and that an indefinite delay in making it is contemplated, the rule that a demand must be made within the statutory period of limitation, counting that period from the time when the demand can first be made has never, so far as we are advised, been held to control and bar the action as a stale demand. (25 Cyc. 1209; Wood on Limitations, sec. 118; *Jamison v. Jamison*, 72 Mo. 640; *Thrall v. Mead*, 40 Vt. 540; *Stanton v. Stanton*, 37 Vt. 411.) The decisions declaring the rule recognize the fact that it may not apply to such cases. Thus in the leading case establishing the rule, *Palmer v. Palmer*, 36 Mich. 494, [24 Am. Rep. 605], the court, after stating the rule, say: "It may be otherwise where delay is contemplated by the express terms of the contract." To the same effect see *Bills v. Silver K. M. Co.*, 106 Cal. 21, [39 Pac. 43]. We are of the opinion that as the plaintiffs, within the four years, set in motion proceedings for a demand for performance and made the actual demand within a few months thereafter, they have not been guilty of laches sufficient to bar their action.

The point is urged upon this appeal that the plaintiffs have not kept the tender good by averring a readiness to deliver the stock and bringing it into court for delivery when performance by the defendants is enforced by the court. There are many authorities holding that where the tender is of specific articles of property, it need not be kept good in this way, but that in such cases the title to the property is presumed to pass and the vendor holds it as bailee for the pur-

chaser. (38 Cyc. 159.) It has been held that payment into court is not necessary where such payment is conditional upon the execution of a deed by the payee, which is similar to the condition in the case at bar. (*McDaneld v. Kimbrell*, 3 Greene (Iowa), 335.) The chief reason for the exception relating to tender of specific articles is that the plaintiff cannot reasonably or conveniently bring bulky articles into court, or carry them about with him in readiness to make his tender good at any time it may be demanded. There are cases which reject the rule if the articles are bills, or bonds, which are as easily carried about as money. We do not think it necessary to decide the question. The point does not seem to have been raised at the trial where, if it had been mentioned, the plaintiff could readily have obviated the objection by producing the stock, or by submitting to a conditional judgment making the money payable only upon the deposit of the stock in court for the defendants' use. Upon a new trial the court may allow an amendment to the complaint on this point and require the production of the stock.

The judgment is reversed.

Angellotti, J., and Sloss, J., concurred.

Hearing in Bank denied.

[L. A. No. 2827. Department Two.—December 24, 1912.]

SOUTHERN PACIFIC RAILROAD COMPANY, Appellant, v. JACKSON OIL COMPANY et al., Respondents.

PUBLIC LAND—RAILROAD GRANT—INDEMNITY SELECTIONS—RELATION OF PATENT.—The general rule is that patents to a railroad for indemnity lands relate back to the date of selection of the land within the indemnity limits, with the approval of the land department.

ID.—LAND DEPARTMENT—JURISDICTION—FINALITY OF PATENT.—Pending a proceeding before the United States Land Department for the issuance of a patent to land, the secretary of the interior has jurisdiction to review all rulings theretofore made, but after patent has issued and the government has formally declared that it conveyed the land in question, no further departmental interference is legally possible.

ID.—IDENTITY OF LAND CONVEYED—FINAL DECISION OF SECRETARY OF INTERIOR—CONFLICTING SURVEYS—MINERAL LOCATIONS.—The final decision of the secretary of the interior determining that a patent issued to the Southern Pacific Railroad Company for indemnity land, conveyed the land in accordance with the official survey in force at the time the patent was issued, and was dependent upon a supplementary indemnity application which antedated the patent, and was not in accordance with a different survey in effect when the original application to select the land was made, is conclusive upon a claimant of land under mineral locations made subsequent to the issuance of the patent.

APPEAL from a judgment of the Superior Court of Kern County. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

William Singer, Jr., and Frank Thunen, for Appellant.

M. B. Harris, E. M. Harris, C. L. Clafin, and Goodfellow, Eells & Orrick, for Respondents.

MELVIN, J.—Plaintiff sued to recover possession and rent for the use of a certain tract of land in Kern County known as lot 4 of section 11, in township 30 south, range 21 east, Mount Diablo base and meridian. Judgment was in favor of defendants, and plaintiff prosecutes this appeal therefrom.

Plaintiff bases its claim for title to and right of possession of said lot 4 upon a patent dated January 25, 1896, from the United States government to plaintiff for a tract of land designated as the northeast quarter of section 11. The land in controversy is within the above-mentioned quarter section according to the official survey made by one Carpenter in 1893, but defendants contend and the court evidently concluded that the land conveyed by plaintiff's patent was the northeast one-fourth of section 11 as designated by an earlier survey (also official) made by one Reed in 1869. Lot 4 is not included within the quarter section as shown by the Reed survey. Defendants claim the right to possession of the land under mining locations. Before this action was commenced defendants had discovered and developed oil on the premises. If the Reed survey controls plaintiff's patent, lot 4 was not conveyed to that corporation. If the Carpenter survey is to

be followed, then the land in question belonged to plaintiff and was not subject to location for mining when defendants took possession thereof.

On February 17, 1892, the Southern Pacific Railroad Company applied, by list No. 48, to be permitted to select certain indemnity lands including the northeast one-fourth of section 11. At that time the Reed survey was the only official ad-measurement of that section. Said survey had been approved April 27, 1869. On November 18, 1893, the Carpenter survey was approved. By it the former northeast quarter of section 11 was preserved and marked on the Carpenter map as "S. P. R. R. Co., Lot 41." It was not attached to any section according to the Carpenter map, but subsequently to the issuance of plaintiff's patent a section line was run through said lot 41, thereby placing a part of it in section 11, and the remainder in section 2. On June 24, 1902, plaintiff filed a supplemental indemnity list, No. 48, specifying the lot here in question. On January 14, 1896, indemnity selection list No. 48 was approved by the interior department. On January 25, 1896, patent No. 31 was issued from the government to plaintiff for the northeast quarter of section 11. If that patent operates only as of the date of its issue it includes lot 4 within the terms of its description; if it relates back to the date of the selection of the northeast quarter of section 11, then its description covers not the quarter section in which lot 4 is located, but that which is called on the Carpenter map "S. P. R. R. Co. Lot 41." The general rule is that such patents relate back to the date of selection of the land within the indemnity limits, with the approval of the land department. (*Southern Pacific Co. v. Wood*, 124 Cal. 475, [57 Pac. 388]; 32 Cyc. 960; *Weyerhaeuser v. Hoyt*, 219 U. S. 391, [55 L. Ed. 258, 31 Sup. Ct. Rep. 300].) Therefore, respondents contend that the patent was exactly like one which might have been issued December 23, 1891, when the Reed survey alone was in effect, in so far as the actual location of the land was concerned.

The land department has rendered conflicting decisions with reference to this lot. On July 16, 1902, Commissioner Hermann, after citing the decision in *Southern Pacific R. R. Co. v. Bruns*, 31 Land Dec. 272, rendered an opinion which is in part as follows:

“Following the ruling of the department in the case cited which involved sec. 1 of this township, I must hold that the patent issued January 25, 1896, to the company for the N. E. 1-4 of sec. 11, covers lots 1, 4 and 9 of sec. 11, as that was the only public land in said quarter section at that date. While said lots 1, 4 and 9 were never selected by the company, yet the patent is unimpaired and the company will be required to specify from the lands lost within the primary limits of the grant a basis for the land so irregularly patented.”

This decision was approved by the secretary of the interior. The company subsequently gave formal acceptance to this ruling, and the commissioner declared the case closed. This was in 1903. Plaintiff contends that this decision and its acceptance were binding on all persons, and that no question may now be raised with reference to plaintiff's title. Defendants, on the other hand, insist that the matters decided were merely based upon questions of law, and as plaintiff and nobody else has assented to their correctness, the defendants herein are not bound by the rulings of the land department. They also assert that the Bruns decision has been vacated and recalled and that the department of the interior has adopted the view for which they contend. In *McKittrick Oil Co. v. Southern Pacific R. R. Co.*, 37 Land Dec. 244, the department, following *Gleason v. White*, 199 U. S. 54, [50 L. Ed. 87, 25 Sup. Ct. Rep. 782], reversed the ruling made in *Southern Pacific R. R. Co. v. Bruns*, and on March 17, 1911, the very selection now under discussion was reviewed by the commissioner of the general land-office, who held that the patent of the Southern Pacific Railroad Company dated January 25, 1896, did not convey any title to lots 1, 4, and 9 of section 11. The department of the interior, however, reviewed this ruling, and overruled *McKittrick Oil Co. v. Southern Pacific R. R. Co.*, 37 Land Dec. 244, in the following opinion:

“The Southern Pacific Railway Company has appealed from the decision of the commissioner of the general land-office, dated March 17, 1911, wherein, as the result of a contest proceeding instituted by the Jackson Oil Company, it was found that lots 1, 4, and 9, being a part of the N. E. 1-4, sec. 11, T. 30 S., R. 21 E., M. D. M., Visalia land district, California, are oil lands; that said tracts were not embraced

in any previous patent issued to said company; and that its selection therefor, which was held to be still pending, was rejected because of said mineral finding.

“The mineral character of the tracts in question seems to be conceded, but the railroad company earnestly contends that the tracts involved are not public lands, having been included in the patent issued to said company January 25, 1896.

“This township was originally surveyed by one Reed, whose survey was approved April 27, 1869. The township was later surveyed by one H. P. Carpenter, whose survey was approved November 18, 1893, and the plat thereof filed in the local land-office at Visalia, April 6, 1894.

“December 26, 1891, the Southern Pacific Railroad Company applied to select, among other tracts, the N. E. 1-4 of section 11 of this township. The selection was not acted upon until 1896, when patent was made to it of the N. E. 1-4 of section 11 of said township. The question involved is as to whether such N. E. 1-4 is to be understood according to the survey in effect when the company applied to select this land, or the survey in force at the time the patent was issued. It is well settled that no selection is complete until acted upon by the department. At the time the department acted on this application the Carpenter survey was in force and there was no authority in law for issuing patents to the railroad in other than odd-numbered sections. It necessarily follows that the patent issued in 1896 to the railroad company must be interpreted according to the Carpenter survey. If a mistake was made in issuing the patent—which is not decided—it is too late to correct that mistake. It necessarily follows that lots 1, 4, and 9 did pass to the railroad under the patent of 1896, while no land now in section 2 under the Carpenter survey passed to the railroad.

“This holding is in consonance with the decision of the department of January 23, 1903. Consequently the patent of 1896, issued to the railroad company, as held in said decision of January 23, 1903, conveyed the title to these lots to said company; and since then this department has been without jurisdiction over the lands. Any expression to the contrary, in the case of *McKittrick Oil Co. v. Southern Pacific Rail-*

road Co. (37 Land Dec. 243), must be regarded as overruled.

“The decision appealed from is reversed and the cause is dismissed.”

With the foregoing opinion we entirely agree. The United States government by its duly authorized agents declared the title to this lot to be in the plaintiff, and the whole matter finally settled and closed. This was in 1903, and the mining locations which are the bases of the title asserted by defendants were made in 1907 and 1908. This ruling was supported by the plaintiff's patent which in terms related to this very land. In 1903 the patent was ratified by mutual construction given by the parties thereto. While the matter was pending, the secretary of the interior had jurisdiction to review all rulings theretofore made (*Gage v. Gunther*, 136 Cal. 345, [89 Am. St. Rep. 141, 68 Pac. 710]), but after the patent had issued and the government had formally declared that it conveyed the land in question, no further departmental interference was legally possible. The secretary of the interior might have requested the attorney general, to institute proceedings for the annulment of the patent (*Gage v. Gunther*, 136 Cal. 345, [89 Am. St. Rep. 141, 68 Pac. 710]), but that would have been the limit of his authority. He did not pursue such course but on the contrary, after a review of the facts, he declared the transaction between the government and the patentee to be closed. It was for him to determine whether the patent as finally issued was dependent upon the selection originally made or upon the supplement to indemnity list No. 48, which antedated the patent and in which lot 4 was specified by the Southern Pacific Railroad Company. Upon the facts presented he did not, in our opinion, err in his interpretation of the law.

The judgment is reversed.

Henshaw, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[Sac. No. 1913. Department Two.—December 26, 1912.]

CARLTON H. WOOD, Respondent, v. COUNTY OF CALAVERAS, LOUIS CADEMARTORI, as Tax-Collector of said County of Calaveras, and ADAM POE, as County Auditor of said County of Calaveras, Appellants.

SCHOOLS—UNION HIGH SCHOOL DISTRICT—PROPERTY WITHIN EXEMPT FROM TAXATION FOR COUNTY HIGH SCHOOL—CONSTITUTIONAL LAW.—The provisions of the Political Code as they existed prior to the amendments of 1909, (Pol. Code, secs. 1670, 1675), exempts the property in a union high school district from taxation for the support of a county high school. Such exemption is not in violation either of subdivision 20 of section 25 of article IV of the constitution, which prohibits local laws exempting property from taxation, or of section 11 of article I, which requires all laws of a general nature to have a uniform operation.

ID.—TERRITORIAL LIMIT OF COUNTY HIGH SCHOOL—SAME COUNTY MAY INCLUDE DIFFERENT KINDS OF HIGH SCHOOLS.—Because a district is called in such sections of the Political Code a "county high school district" furnishes no reason why it should not contain less than the territory of one county. The provisions of the sections, particularly subdivision 20 of section 1670, show that the legislature contemplated the existence of a county high school and other kinds, including union high schools, in the same county at the same time.

ID.—LEGISLATIVE CONTROL OVER FORMATION OF HIGH SCHOOLS.—The whole matter of the formation of high school districts is one of legislative control, and the legislature, in such sections, clearly provided for the formation of a union high school within a county where a county high school exists.

ID.—SPECIAL TAXES FOR SUPPORT OF SCHOOLS—LIMITATION ON PROPERTY LIABLE TO ASSESSMENT.—Taxes for the support of schools are in their nature special taxes, and the legislature has the power to limit their assessment to the property within the respective districts to be served.

ID.—ESTOPPEL—FORMER PAYMENT OF INVALID TAX.—The people within a union high school district are not estopped to deny the validity of a tax on the property therein situated assessed for the support of a county high school, merely because a similar tax had been formerly paid without protest.

ID.—DE FACTO HIGH SCHOOL DISTRICT—COLLATERAL ATTACK ON EXISTENCE.—The existence of a *de facto* high school district cannot be collaterally attacked.

ID.—VALIDATION OF FORMATION OF UNION HIGH SCHOOL DISTRICT.—Subdivision 11 of the old section 1671 of the Political Code, and section 1724 of that code, adopted in 1909, had the effect of validating and making unquestionable the legal existence of a union high school district which had been operating as such for one year. Such curative acts are valid.

APPEAL from a judgment of the Superior Court of Calaveras County. A. I. McSorley, Judge.

The facts are stated in the opinion of the court.

J. P. Snyder, for Appellants.

Frank J. Solinsky, and Paul C. Morf, for Respondent.

MELVIN, J.—Plaintiff is a resident within Bret Harte Union High School district. His property, being wholly within said district, was assessed for the support of said union high school and likewise for the Calaveras County High School. Deeming the latter assessment improper he tendered to the tax-collector of the county the amount of his tax less the sum demanded for county high school purposes. The tender being refused he deposited the money so tendered in bank to the credit of the tax-collector and gave notice to that official, all in accordance with section 1500 of the Civil Code. He then brought this action to have the tax for the support of the county high school declared invalid and to compel the tax-collector to accept the money tendered. From a judgment granting his prayer this appeal is prosecuted.

Prior to the formation of the Bret Harte Union High School district, the Calaveras County High School District was formed, including territorially, the whole of the county of Calaveras. All of the property within the county was taxed for the support of that district. Appellants are of the opinion that, (1) the exemption of the property within the Bret Harte Union High School district would be a fraud upon the owners of the remaining property of the county, and an unconstitutional confiscation of their property; that, (2) the people of the Bret Harte High School district are estopped from questioning the legality of the tax for the county high

school; and that, (3) the union district was never legally formed.

It is conceded that the provisions of the Political Code in existence at the time of the formation of the Bret Harte Union High School district exempted the property in such a district from taxation for the support of a county high school, but such exemption is attacked by appellants as being in violation of subdivision 20 of section 25 of article IV of the constitution, which prohibits local laws exempting property from taxation, and section 11 of article I requiring all laws of a general nature to have a uniform operation. Prior to 1909 the law with reference to the establishment and maintenance of county high schools provided (sec. 1671 of the Pol. Code as it then stood) as follows: "There may be established in any county in this state one or more county high schools; provided, that at any general or special election held in said county after the passage of this act, a majority of all the votes cast at such election, upon the proposition to establish a high school, shall be in favor of establishing and maintaining such county high school or schools at the expense of said county." Appellants contend that this language involves the inclusion of the whole county within the county high school district—that the words "county high school" mean exactly what they import—a school for the use of the inhabitants of the county. It will be noted, however, from an examination of the section, that while the school is to be maintained at the expense of the county, the statute does not provide that all of the electors of the county shall or may participate in the election nor that it shall be held *throughout* the county. Former section 1670, by subdivision 20 thereof, provided:

"Nothing in this section shall be construed as preventing all of the school districts in any county from uniting to form one or more county high schools; provided, that when any city, incorporated town, school district, or union high school district shall vote to maintain a high school, such territory shall be exempt from taxation to support a county high school; and provided further, that when any city, incorporated town, school district, or union high school district shall establish a high school prior to the submission of the proposition to establish a county high school, the electors of such city, incorporated town, school district, or union high school

district shall be excluded from voting upon said proposition; provided further, that in counties where one or more city high schools, district high schools, or union district high schools, are maintained, the board of supervisors shall, upon the petition of two-thirds of the heads of families in a city high school district, district high school district, and in each school district composing the union high school district or districts, if there be more than one in the county, submit to all the qualified electors of the county the question of establishing and maintaining a county high school, and shall take such further steps as provided in section sixteen hundred and seventy-one of this act, relating to high schools. If the majority of all the votes cast on the proposition to establish a county high school are in the affirmative the board of supervisors shall, upon the establishment of the same, declare the high school or high schools existing in the county at the time of the election for a county high school, to be lapsed and the property of such lapsed high school or schools shall be held or sold by the board of supervisors for the benefit of the county high school."

By the fourth subdivision of former section 1671 the board of supervisors in providing for the special tax therein authorized was limited in making the levy to "all of the assessable property of the county, except as provided in subdivision twentieth of section one thousand six hundred and seventy of the Political Code." The above quoted provisions indicate that the legislature did not intend that a union high school district should be taxed for the support of its own school and for the maintenance of another school within the county. The two kinds of districts did not differ materially in the manner of formation. One was governed by the county board of education and the other by a district board, but there was and is no essential difference in the manner of their conduct and control. It has been held that a city school district is a corporation of a *quasi* municipal character and though its territorial limits may be actually coterminous with those of a city, its identity is not thereby lost nor merged in that of the city. (*Los Angeles School District v. Longden*, 148 Cal. 381, [83 Pac. 246]; *Hancock v. Board of Education*, 140 Cal. 561, [74 Pac. 44].) So it may be said with equal force

that because a district is called a "county high school district," that fact furnishes no reason why it should not contain less than the territory of one county. It is evident from the provisions of the law as it stood at the time of the creation of the Bret Harte Union High School district, and particularly subdivision 20 of section 1670 of the Political Code above quoted, that the legislature contemplated the existence of a county high school and other kinds, including union high schools, in the same county at the same time. The contention is made that there should have been a dissolution of the county high school district prior to the formation of the union district and that a school district in the territory of an established high school district may not seek to enter another high school district until after its withdrawal from the district with which it was formerly connected. *Moorpark School Dist. v. Reynolds*, 13 Cal. App. 171, [109 Pac. 149], is cited in this behalf. The court in that case was considering the sufficiency of certain petitions filed by residents of school districts for the formation of a new union high school district and it was held that as one of these districts was already in a union high school district it could not come into a new union high school district. But there is no method provided by law for the formal withdrawal of a school district, as such, from a county high school district. Therefore, that case is not in point here. It has been held that territory may pass from a union high school district otherwise than by formal withdrawal,—namely, by operation of law when such territory is annexed to an incorporated city. (*Frankish v. Goodrich*, 157 Cal. 614, [108 Pac. 685].) The whole matter is one of legislative control and the legislature has clearly provided for the formation of a union high school district within a county where a county high school exists. In *Hughes v. Ewing*, 93 Cal. 417, [28 Pac. 1067], the court was considering the matter of a tax levy upon the property in a school district the limits of which had been changed between the time of an election by which a certain sum was voted for school purposes and the levy of the tax to raise said funds. It was held that property in the old but not included in the new district was not subject to the burden of a tax. In the course of the opinion the following language, which is applicable to the case at bar, was used: "The power

to change the boundaries of the district, as well as to define them in the first instance, is of legislative origin, and, whether exercised immediately by the legislature or mediately by a board of supervisors—the local legislature—is, whenever exercised, a legislative act. It is well settled that the legislature has the power to make such changes, and that in the exercise of this power it may make such provision respecting the property and obligations of the corporation as it may deem equitable or proper, and that its action in this respect is conclusive. It is also well settled that when the boundaries of such corporation are changed, either by forming a new corporation out of the territory of the original one or by transferring a portion of the territory to another corporation, in the absence of any provision on the subject, the old corporation will be entitled to all the property and be solely liable for all the obligations, and that the territory taken therefrom will not be entitled to any of the corporate property or liable for any of the obligations of the old corporation.” Counsel for appellants earnestly protest that the power of school districts within a county to carve out new union high school districts being conceded, a situation might arise whereby the territory remaining might be too small and too poor to continue in operation the original county high school. That, however, is a matter of legislative rather than judicial concern.

The principal argument of appellants against the constitutionality of the sections under review is based upon the statement that the county high school was and is kept open for the benefit of the inhabitants of the entire county, and that, therefore, the property in said county should be subject to taxation for its support. It is true that prior to the amendments of 1909 the ninth subdivision of section sixteen hundred and seventy-one of the Political Code contained this language: “All county high schools shall be open to the admission of graduates holding diplomas from the grammar schools of the county, and to all pupils of the county who can pass the examination for admission. The examination for admission shall be conducted by the county board of education and the principal of the county high school.” This, however, was merely a declaration of the scholastic requirements for admission to a county high school. The matter of *attend-*

ance was regulated elsewhere, for subdivision 25 of section 1670 of the Political Code was as follows: "When, in consequence of distance or of convenience in traveling, it is more convenient for pupils residing in any high school district to attend the high school in another high school district, the high school board of the latter district may admit such pupils to the high school in their district upon such terms as the two boards may arrange." This provision has been practically retained in section 1751 of the Political Code adopted in 1909. We can find no reason, either in the former or the present statutes applicable to high schools, why the word "district," as used therein, did not apply to territory to be served by county high schools as well as by union high schools.

The taxes for the support of schools are in their nature special taxes and the legislature has the power to limit their assessment to the property within the respective districts to be served. (*Chico High School Board v. Board of Supervisors*, 118 Cal. 119, [50 Pac. 275]; *Brown v. Visalia*, 141 Cal. 380, [74 Pac. 1042].) In *People v. Lodi High School District*, 124 Cal. 700, [57 Pac. 662], this court said: "It is within the power of the legislature to constitute these schools and to provide for their support by methods different from those adopted for like purposes as to other schools." And again, in *Hughes v. Ewing*, 93 Cal. 417, [28 Pac. 1067]: "It would be difficult, upon principle, to uphold the validity of a tax upon property which is without the district to be benefited by the expenditure of the moneys so to be raised." We are satisfied that the statutes exempting property within union high school districts from taxation for the support of county high schools were constitutional and that the decision of the superior court based upon them was correct.

The people within the Bret Harte Union High School district were not estopped to deny the validity of the tax in question. No special facts constituting estoppel are pleaded and the general circumstance that the tax had been paid formerly without protest was not sufficient to prevent plaintiff from denying its validity. It was void and could not be cured by the application of the doctrine of estoppel. (*Raisch v. City and County of San Francisco*, 80 Cal. 6, [22 Pac. 22]; *Lukens v. Nye*, 156 Cal. 506, [20 Ann. Cas. 158, 36 L. R. A. (N. S.) 244, 105 Pac. 593].)

The final contention of appellants is that the Bret Harte Union High School district has no legal existence because of the failure of those seeking to create it to comply with all the requirements of the law. There are two complete answers to this objection to the recognition of the district. The first is that the existence of the union district as a *de facto* high school district cannot be attacked collaterally. (*Hancock v. Board of Education*, 140 Cal. 560, [74 Pac. 44].) The second answer is that the legislature has passed validating or curative acts making unquestionable the legal existence of districts which have been operating as such. There is no question in the present case of the facts that in the Bret Harte district its trustees had erected school buildings and employed teachers and its inhabitants had paid taxes for the maintenance of the high school and that it had been conducted generally as a duly organized high school district. There was evidence that the superintendent of schools had properly certified the result of the election by which the inhabitants of the school districts included within the Bret Harte district had voted to establish said union high school district. Subdivision 11 of old section 1671 of the Political Code provided "the certificate of the county superintendent mentioned in subdivision four of section one thousand, six hundred and seventy of the Political Code when filed with the county clerk, when the result of the election as therein declared is in favor of the establishment of the high school, shall at the expiration of one year from the date of such filing be conclusive evidence that such high school district and high school has been legally established." The language of section 1724 of the Political Code, adopted in 1909, contains a broader provision as follows: "All proceedings for the formation and organization of high school districts and the establishment of county, city, city and county, union, joint union and district high schools, had prior to the taking effect of this section, are hereby validated and declared legal, and said high school districts and high schools, and any other high school district which have been acting as such for more than one year previous to the taking effect of this section, are hereby declared to be legally formed, organized and established." Such curative acts have been held valid. (*People v. School Dist.*, 101 Cal. 661, [36 Pac. 119]; *Board of Education v. Hyatt*, 152 Cal. 519, [93

Pac. 117]; *People v. Pacific Grove etc. Dist.*, 11 Cal. App. 213, [104 Pac. 586].)

For the reasons above set forth the judgment is affirmed.

Henshaw, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[S. F. No. 5776. Department Two.—December 26, 1912.]

WEST BERKELEY LAND COMPANY (a Corporation),
et al., Appellants, v. CITY OF BERKELEY (a Municipal Corporation), et al., Respondents.

MUNICIPAL CORPORATION—OPENING STREET OVER TIDE LANDS.—A municipality has power, under the provisions of the Street Opening Act of 1889 (Stats. 1889, p. 70), to open or extend its streets over tide lands.

ID.—MEANING OF WORD "LAND."—The words "land" and "lands" as used in that act, are used in the technical sense meaning "territory," and not in their popular sense as meaning the exposed surface of the earth as distinguished from ground which is alternately covered and uncovered by the tides.

ID.—POSTING NOTICES OVER TIDE LANDS—NOTICES ATTACHED TO FLOATS.
It is a sufficient posting of notices of the passage of the resolution of intention to open a street across tide lands, to attach the same to floats anchored at proper intervals along the line of the proposed work, so constructed that the notices appeared two and a half or three feet above the surface of the water, and in the absence of a contrary showing, it must be presumed that such notices remained in place during the period contemplated by the statute.

ID.—SUFFICIENCY OF NOTICE TO PERSONS NOT OWNERS OF TIDE LANDS.—
Even if such a posting were insufficient as against the owners of the tide lands sought to be condemned, other persons, who were merely landowners within the assessment district affected, could not complain of the insufficiency.

ID.—DESCRIPTION OF EXTERIOR BOUNDARIES OF ASSESSMENT DISTRICT—REFERENCE TO UNOPENED STREET—DEDICATION AND ACCEPTANCE BY MUNICIPALITY.—In describing in the resolution of intention the exterior boundaries of the district to be assessed for such work, it is a sufficient compliance with the requirements of section 2 of that

act, to identify a portion of such boundaries by reference to a certain unopened street, the dedication of which, as the same was delineated upon a particular map on file, had been previously accepted by the municipality, prior to any manifestation by the owner of an intention to revoke the dedication, and before any rights of third persons had intervened.

ID.—DESIGNATION OF TERMINUS OF STREET—LOCATION OF BOUNDARY OF TIDE LAND—REFERENCE TO MAP IN ANOTHER COUNTY.—A resolution of intention which declares the purpose to open and extend a street “westerly to the westerly boundary line of state tide lands,” within the municipality, is not rendered insufficient merely because, for the purpose of exactly locating such boundary, reference must be had to an official map the custody of which was intrusted to an official who was not located in the county in which the municipality was situated.

APPEAL from a judgment of the Superior Court of Alameda County. William H. Waste, Judge.

The facts are stated in the opinion of the court.

McKee & Tasheira, and R. M. F. Soto, for Appellants.

Redmond C. Staats, James M. Koford, F. D. Stringham, and George L. Hughes, for Respondents.

MELVIN, J.—Plaintiffs sued to recover from the city of Berkeley money paid under protest to prevent the sale of certain lands by the superintendent of streets of that city because of delinquency in paying assessments upon said properties levied in the proceedings for the opening and extension of Snyder Avenue under the provisions of the Street Opening Act of 1889. (Stats. 1889, p. 70.) From a judgment in favor of defendants this appeal is taken.

Appellants question the authority of the municipality to open or extend its streets over tide lands. By the first section of the Street Opening Act of 1889 the city council of any municipality is granted power “to condemn and acquire any and all land and property necessary or convenient for that purpose.” Appellants quote a number of sections of that statute in an effort to show that the words “land” and “lands” are employed in the act in their ordinary and popular meaning rather than in a technical sense. They assert that “lands” in the ordinary acceptation of the term is a

word applicable to the exposed surface of the earth and not to ground which is alternately covered and uncovered by the flow and ebb of the tide. They say that the constitution and codes of California make a distinction between public lands in the ordinary sense and tide lands (citing Const., art. XVII, sec. 3; art. XV, sec. 3; Pol. Code, secs. 3395 et seq.; Pol. Code, sec. 3443a), but they have evidently lost sight of the fact that the differences in treatment by the law-making power of tide lands and other public lands is due partly, at least, to the different sources of the state's original title, the lands above the shore having been acquired by direct grant from the general government, and the tide lands by reason of the state's sovereignty. (*People v. Morrill*, 26 Cal. 352.) Very early in the history of California this court recognized and declared the right of the state to surrender into the jurisdiction and control of a city and to sell into private ownership not only tide lands but those perpetually submerged. (*Eldridge v. Cowell*, 4 Cal. 87.) Jurisdiction over lands of this kind logically involves such incidental authority as the city may exercise in the condemnation of rights of way, the construction of streets and the like. In *City of Oakland v. Oakland Water Front Co.*, 118 Cal. 185, [50 Pac. 286], the chief justice, delivering the opinion of this court, said: "It is true that the private ownership of the shore may prevent access to the navigable waters of the bay, but so does the private ownership of the upland prevent access to the shore and to the navigable waters in the same sense and to the same extent. This, however, is a minor and temporary inconvenience for which our laws and the laws of all civilized states provide an ample remedy. By the exercise of the right of eminent domain all necessary means of access from the uplands to the waterfront may be condemned for the public use, at a cost not in excess of the reasonable value of the land taken or subjected to the servitude." The right of a city to reserve portions of the lands lying below tide water within its limits for street purposes was fully recognized in *Shirley v. City of Benicia*, 118 Cal. 346, [50 Pac. 404]. Both before and after the passage of the act under which the opening and extension of Snyder Avenue was conducted, there were adjudications of a municipal corporation's power to extend streets across tide lands into deep water within the limits of such city. The legisla-

ture has left the act in practically its original form, and we must conclude, in view of both prior and subsequent judicial decisions, that the words "land" and "lands" in that statute were used in the technical sense meaning "territory" and not with the definition for which appellants contend. By the very first section of the act the city council is given "full power to order the opening, extending . . . or closing up . . . of any street . . . within the bounds of such city, and to condemn and acquire any and all land and property necessary or convenient for that purpose." It would be difficult to find general language more completely inclusive of municipal territory both wet and dry, both exposed and submerged. There can be no rational doubt of the city's power to extend the street in question over tide lands.

Appellants condemn the method adopted by the street superintendent in posting notices of the passage of the resolution of intention in the matter of opening Snyder Avenue. According to the evidence these notices seem to have been in due form and to have been printed in letters of requisite size. Guided by a surveyor on shore the superintendent of streets went out in a boat at high tide and anchored notices attached to floats at proper intervals along the line of the proposed work over the tide lands. The floats were so constructed that the notices appeared two and a half or three feet above the surface of the water. This method of posting is the only part of the service of notice of which appellants complain. There is no contention that notice was not sufficiently given by publication in a newspaper and by posting along that part of the proposed street which was above the line of high tide; but appellants assert that no reasonable notice may be given by the anchoring of floats supporting small placards at intervals of three hundred feet far out in the bay. Even if the notice given were not sufficient as against the owners of the tide lands (and we think it was ample), nevertheless these appellants could not reasonably complain because they were not owners of property to be condemned, but were residents within the assessment district affected. (*Davies v. City of Los Angeles*, 86 Cal. 46, [24 Pac. 771].) The sort of constructive notice authorized by the act here considered has been so long approved that there is now no doubt of its sufficiency where the requirements of the statute have been followed. (*Davies*

v. *City of Los Angeles*, 86 Cal. 46, [24 Pac. 771].) The constitutionality of the statute has been upheld frequently, notably in the case of *Clute v. Turner*, 157 Cal. 74, [106 Pac. 240]. There is no force in the suggestion of appellants that from the material upon which the notices were printed, the manner of their attachment to the tide lands and the character of those lands, it must be presumed that the placards did not remain posted during the period contemplated by the statute. The presumption is just the opposite. Due performance of duty by an officer of the law is presumed and the burden of proof is upon the person asserting official default. (*County of Los Angeles v. Lankershim*, 100 Cal. 532, [35 Pac. 153, 556].) When, as in this case, an affidavit is made that notices have been posted as required by law, the presumption arises that they remained in place during the statutory period. (*Estate of Sbarboro*, 70 Cal. 149, [11 Pac. 563]; *Crew v. Pratt*, 119 Cal. 153, [51 Pac. 38].)

The next assignment of error made by appellants relates to the exterior boundaries of the district to be assessed for the work here considered. The appellants say that these boundaries are not so specified that they can be ascertained, and our attention is called particularly to that part of the description depending upon the location of the southerly line of Stuart Street. It appears from the evidence that Stuart Street had no existence as an open street upon the ground prior to the initiation of the proceedings to extend Snyder Avenue. On August 7, 1888, Mrs. Mary D. Mathews caused the filing of a map of "Mathews Tract, Berkeley, Oakland Township," upon which was delineated certain streets, one of them designated as "Moss Street." On June 27, 1892, the town of Berkeley accepted this dedication, and on October 16, 1893, the name of Moss Street was changed by ordinance to "Stuart Street." Between the time of the filing of the map and the acceptance of the proposed dedication by the city the land was inclosed by a fence. No property was sold in accordance with the map and the land was farmed until the death of Mrs. Mathews in 1900. After that it was not cultivated and the fence was removed. On July 11, 1892, after the formal acceptance by the town of Berkeley of the dedication of the streets shown on the map of the Mathews Tract, Mary D. Mathews filed a declaration of revocation by which

she sought to annul her map of 1888. In this document she declared among other things that "said map was filed merely for the purpose of convenience and for no other or further purpose and not for the purpose of dedicating or offer to dedicate any street delineated thereupon." The only question for us to determine is whether the reference to Stuart Street in describing the exterior boundaries of the assessment district was a sufficient compliance with section 2 of the act of 1889. That section prescribes a description in the resolution of intention "specifying the exterior boundaries of the district of lands to be affected," etc. The act does not indicate the sort of monuments or measurements to be used in the description, nor that streets, whether formally dedicated or not, should be mentioned therein; but assuming the formal dedication and acceptance of a street to be necessary in order that its lines should officially form any part of the exterior boundaries of the district, we are of the opinion that the resolution of intention in this case was sufficient. Between the date of the filing of the map and that of the acceptance of the streets by the city, nothing was done by Mrs. Mathews to indicate a change in her declared intention to devote certain platted spaces to the use of the public as streets, nor does it appear that the intervening rights of third persons are involved. The matter is therefore covered by principles announced in *City of Los Angeles v. McCollum*, 156 Cal. 149, [23 L. R. A. (N. S.) 378, 103 Pac. 914].

Appellants attack that part of the resolution of intention which declared the purpose to open and extend Snyder Avenue "westerly to the westerly boundary line of state tide lands," on the ground that the owner is entitled to know from an inspection of the resolution alone whether his land is affected. It was in evidence that certain tide lands commonly known as "State Tide Lands" were situated within the limits of the town of Berkeley. At the trial a certified copy of an official map showing the western boundary of said lands was introduced in evidence. While it is true that the original was intrusted to an official who was not located in Alameda County, the mere inconvenience to which a property holder might have been subjected in order that he might have learned the exact location of the westerly line of said lands does not invalidate the description. It was sufficient that

means were available for making certain the general reference to a well-known tract. (*Best v. Wohlford*, 144 Cal. 737, [78 Pac. 293]; *Baird v. Monroe*, 150 Cal. 571, [89 Pac. 352]; *Fox v. Townsend*, 152 Cal. 58, [91 Pac. 1004, 1007]; *Houghton v. Kern Valley Bank*, 157 Cal. 291, [107 Pac. 113]; *Campbell v. Shafer*, 162 Cal. 211, [121 Pac. 737]; *Kehlet v. Bergman*, 162 Cal. 219, [121 Pac. 918]; *Furrey v. Lautz*, 162 Cal. 399, [122 Pac. 1073].)

Other specifications of alleged error were made by appellants, but as they were not discussed in the brief filed, we will not review them in detail. We have examined them, however, and find them without merit.

The judgment is affirmed.

Henshaw, J., and Lorigan, J., concurred.

[S. F. No. 5872. Department Two.—December 30, 1912.]

**JERSEY FARM COMPANY (a Corporation), Respondent,
v. THE ATLANTA REALTY COMPANY (a Corporation), Appellant.**

EASEMENTS—ENUMERATION OF SERVITUDES IN CIVIL CODE NOT EXCLUSIVE.
Section 801 of the Civil Code, by its specification of certain kinds of servitudes, does not purport to enumerate all the burdens by way of servitudes that may be attached to land for the benefit of the dominant tenement.

ID.—SALE OF PORTION OF LAND SUBJECT TO BURDENS OR BENEFITS—RESULTING EASEMENTS AND SERVITUDES.—It is a general principle that where the owner of two tenements sells one of them, or the owner of the entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and with all the burdens that appear at the time of the sale to belong to it as between it and the property which the vendor retains. This principle is embodied in section 1104 of the Civil Code, and its application is not limited to the list of servitudes and corresponding easements enumerated in section 801.

ID.—LAND SUBJECT TO ENTIRE RECLAMATION SYSTEM—SALE OF PORTION INCLUDING MAIN PLANT—EASEMENT IN FAVOR OF REMAINDER OF TRACT—INJUNCTION.—Where an entire tract of land is subject to a single, complete system of reclamation, of which the surrounding

levee, the main drainage canal to which all other drainage canals led, and a pumping plant to eject the surplus waters, are essential parts, and the portion thereof including the main drainage canal and the pumping plant is sold, an easement is created in favor of the remaining portion of the tract to use the parts of the reclamation system situated on the land conveyed in the same manner and to the same extent as the same were used at the time of the transfer. An interference with the use of such easement will be enjoined.

ID.—TRANSFER BY TRUSTEES UNDER DEED OF TRUST.—It is immaterial to the creation of such easement, that at the time of the segregation of the land the entire tract was subject to a deed of trust, and that the transfers were executed by the trustees in pursuance of its terms.

ID.—PRELIMINARY INJUNCTION—RESTRAINING INTERFERENCE WITH USE OF EASEMENT—EVIDENCE LIMITING EFFECT OF QUITCLAIM DEED.—On an application by the owner of the dominant land for a preliminary injunction restraining the owner of the servient land from interfering with the use of such easement, parol evidence is admissible tending to show that a quitclaim deed of the servient land executed by the former to the latter, and which the latter claimed operated as an extinguishment of the easement, was not intended to have that effect.

APPEAL from an order of the Superior Court of Contra Costa County granting a preliminary injunction. R. D. Latimer, Judge.

The facts are stated in the opinion of the court.

J. C. Meyerstein, H. U. Brandenstein, and A. B. McKenzie, for Appellant.

A. L. Shinn, and M. R. Jones, for Respondent.

HENSHAW, J.—This appeal is from an order granting a preliminary injunction restraining defendant and appellant from interfering with the repair and maintenance by plaintiff of a levee and from interfering with the use and repair of a drainage canal and pumping plant, all situated upon the land of the appellant.

The controversy arises under the following facts: There is in the county of Contra Costa a tract of land comprising over three thousand nine hundred acres which in the state of nature is overflowed by the waters of the San Joaquin River. This land unreclaimed, is valueless, reclaimed, is very valu-

able. Years ago it was reclaimed by its then owner, the reclamation consisting of the construction of a levee around the exterior boundaries of the tract and the excavation of drainage canals conducting the water to the lowest part of the tract where a pumping plant was erected, and the excess water pumped out of the canal and off the land. The levees, canals, ditches, and pumping plant were constructed, installed, and operated as a single indivisible system for reclaiming all of the land and they are still indispensable for its use and cultivation. In 1907 Nathan Fisher was the owner of the land. He made a deed of trust to Archibald Kains, trustee for the benefit of Myra E. Wright, beneficiary, to secure the payment of a sum of money owing by Fisher to Wright. The deed of trust contained a provision empowering Nathan Fisher or his grantee to demand reconveyance of any portion of the tract in lots of not less than fifty acres on the payment of a certain specified sum of money per acre. Herman Bendel by mesne conveyances succeeded to the title and rights of Fisher and tendering the requisite amount of money demanded from the trustee a reconveyance of fifty acres. The fifty acres whose reconveyance was thus demanded was the lowest land of the tract. Upon it was established the pumping plant to which pumping plant by a main canal were conducted the surplus waters of the whole tract. The exterior protecting levee extended along the river frontage of this tract. The trustee refused to make the conveyance and Bendel brought suit to compel him to do so. A decree was given commanding the execution of the deed which the trustee thereupon executed. Subsequently Bendel conveyed this fifty acres to the defendant and appellant herein. Previous to the execution of the trustee's deed to Bendel the trustee had executed under the terms of his trust a deed of all of the rest of the tract to Myra E. Wright. To all the interest of Myra E. Wright in this land plaintiff has succeeded. Defendant refused plaintiff admission to its lands for the purpose of maintaining the outer levee upon the lands, of maintaining and using the drainage canal, and of maintaining and using the pumping plant to expel waters from the drainage canal. Plaintiff insisted upon its right to enter the land of appellant for these purposes. The injunction forbade defendant from interfering with plaintiff in the exercise of its asserted rights.

Appellant's first proposition is that section 801 of the Civil Code enumerates all the burdens by way of servitudes which may be attached to land for the benefit of the dominant tenement and that the burdens imposed by the decree upon its land do not come under any of the classifications enumerated in that section; that the only other section which can have reference to the matter is 1104 of the same code which declares: "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." This section, it is said, affords no ground for the relief awarded to respondent for, it is argued, the easements contemplated by section 1104 are such, and such only, as are classified and enumerated in section 801. This, however, we think to be an incorrect construction of the two sections. The ingenuity and foresight of the legislature would be taxed in vain to name and classify all the burdens which might be imposed upon land. By section 801 it enumerated some of them. By section 1104 it declared generally that in the case of a transfer of real property other easements may spring into existence, easements which could not be enumerated for the very reason that they embrace every burden which by virtue of the manner of use has been imposed upon the portion of the estate not granted in favor of the portion granted. It is a direct recognition of the principle long established and fully recognized by this court (*Cave v. Crafts*, 53 Cal. 135; *Quinlan v. Noble*, 75 Cal. 250, [17 Pac. 69]), that principle being that "where the owner of two tenements sells one of them, or the owner of the entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and with all the burdens that appear at the time of the sale to belong to it as between it and the property which the vendor retains." It is this general principle which is given full recognition by section 1104 and its application is by no means limited to the list of servitudes and corresponding easements enumerated in section 801 of the Civil Code. It follows, therefore, that the character of the burden imposed upon the

servient tenement is not controlling, that it is of no consequence whether that particular burden will fall into or can be forced into any of the seventeen subdivisions of section 801. If it be a burden obviously cast upon the land at the time of the segregation of the title it remains a burden upon that land in favor of the other parcel, and it is an "easement" within the meaning of section 1104 even if it does not come within the limitations of section 801 because section 1104 itself designates it an easement. We have before us, then, one complete scheme of reclamation to which the surrounding levee was an essential part, the main drainage canal upon the fifty acres to which all the other drainage canals led another essential part, and finally, and quite as indispensable, the pumping plant to eject the surplus waters. It would work the destruction of the whole plan to recognize the easement of any of these essentials and not of all. Nor, it may be added, is the right to use a pump under such circumstances a unique burden upon land in the history of the law. Similar cases may be found in *Seymour v. Lewis*, 13 N. J. Eq. 439, [78 Am. Dec. 108]; *Larsen v. Peterson*, 53 N. J. Eq. 88, [30 Atl. 1094]. It is a matter of indifference to the conclusion thus reached, whether the trustee of the whole tract be considered as the absolute owner at the time of the transfers, or whether the successor in interest of Nathan Fisher, the trustor, be considered the owner. In the one case the trustee deeds all of the tract saving the fifty acres to Myra E. Wright and in favor of the land thus conveyed to her springs up the easement to use the remaining fifty acres for the indicated purposes. The later conveyance of the fifty acres would of course be subject to these easements. Precisely the same construction would obtain if Nathan Fisher or his grantee be treated as the owner of the whole tract at the time of the making of the deeds. The deeds by the trustee would then, in effect, be nothing more than deeds by an agent and the same legal result would follow.

Appellant further contends, however, that even if the easements claimed by plaintiff be found to have, or rather to have had an existence, they were extinguished by the deed of Myra E. Wright, predecessor in interest of plaintiff. This contention rests upon the following facts: Myra E. Wright in July, 1909, through the trustee's deed became the owner of all the

tract excepting the fifty acres subsequently conveyed to Bendel. In that fifty acres after demand by Bendel of the trustee for a deed with tender of the money she had no interest other than what may be described for convenience as a mortgagee's interest. The decree awarding Bendel the fifty acres was made on the twenty-fourth day of November, 1909. It would appear that the court's decision had been indicated earlier than this date for the trustee's deed to Bender was dated and acknowledged on November 22, 1909, and a quitclaim deed and release to Bendel from Myra E. Wright and her husband was given, which deed was dated and acknowledged on November 20, 1909. Upon these facts appellant argues that the release of Myra E. Wright to plaintiff is to be construed by its terms and by its terms alone; that "release" is the appropriate word to be used for the extinguishment of an easement; that a deed by the owner of the dominant tenement to the owner of the servient tenement extinguishes easements and that the inevitable result is that whatever burdens and servitudes existed upon the Bendel fifty acres were by the deliberate act of Myra E. Wright released and extinguished. Over these general principles there can be no controversy. (*Durkee v. Jones*, 27 Colo. 159, [60 Pac. 618]; 14 Cyc. 1191; Jones on Easements, sec. 845; Devlin on Deeds (2d ed.), sec. 27.) The court, however, received evidence of the circumstances under which the deed of quitclaim and release was executed and from this evidence concluded, as it had the right to do (Code Civ. Proc., secs. 1860, 1861), that "release" was not employed in its technical sense for the extinguishment of the easements but that the instrument of quitclaim and release was made only for the purpose of carrying into effect the provisions of the trustee's deed and of giving to Bendel simply the title which the trustee's deed justified him in demanding. The evidence upon this point is that the right to appeal from the court's decree existed in favor of Myra E. Wright, that her quitclaim deed preceded in date the deed of the trustee to Bendel, that there was no mention in the deed of easements or servitudes and no indication other than that contained in the use of the word "release" of any intent to extinguish the servitudes. There is positive testimony by the husband of Mrs. Wright who joined

in the release that the sole purpose of it was to end the litigation, to fortify the trustee's deed and to give to Bendel just such title as he was entitled to take under the trustee's deed and no more; that a previous sale under the deed of trust had been made to Myra E. Wright and the quitclaim was further designed to relieve the Bendel land from all question of the effect upon it of this previous sale.

For these reasons the decree and the order appealed from are affirmed.

Melvin, J., and Lorigan, J., concurred.

Hearing in Bank denied.

In denying a hearing in Bank the court in Bank rendered the following opinion on January 29, 1913.

THE COURT.—The petition for rehearing is denied. In answer to the proposition argued in the petition, that the effect of the court's decision is to permit declarations of the intent of the grantor in making the deed to control the language of that instrument, it is proper to point out that the hearing before the trial court was solely to determine whether or not a preliminary injunction should be granted. The language of this court was addressed solely to the case made in the trial court upon that hearing—a hearing which was had principally upon affidavits. The defendant having set up the quitclaim deed in its answer, it was open to plaintiff to meet and overcome its legal effect in any appropriate way. It did this by evidence tending to show that the quitclaim deed owed its existence to a mistake in law upon the part of the grantor, taken advantage of by the grantee. It is, of course, true that where an instrument is sought to be avoided for fraud or for mistake in law or in fact, evidence is admissible as to what the grantor intended to do or to convey (Civ. Code, sec. 1578, subd. 2.) Therefore, what is decided upon this appeal is that enough was shown to have justified the court in granting the temporary injunction. Whether the reformation of the deed is required; whether, if required, it may be accomplished under the implied replication to defendant's answer, or whether a separate action seeking affirmative relief on this ground should be brought by plaintiff, are one and all ques-

tions whose consideration pertain to the principal case when that case comes to be tried upon its merits and formal findings are made. Therefore those questions are left until that time.

[S. F. No. 5891. Department Two.—December 30, 1912.]

JOSEPH H. GOLDMAN, Respondent, v. JAMES A. MURRAY, ALFRED D. BOWEN, and C. W. BUCHHOLZ, Defendants; JAMES A. MURRAY, Appellant.

EQUITABLE ASSIGNMENT—PROMISSORY NOTES TAKEN FOR PART OF DEBT OF CORPORATION—INDORSEMENT OF NOTES—INDORSEE BECOMES ASSIGNEE PRO TANTO OF ORIGINAL DEBT—INVALIDITY OF NOTES.—Where a *bona fide* creditor of a corporation takes from it promissory notes evidencing a part of its debt to him, in the belief of the validity of the notes, and passes them on in due course of business to his creditor, the notes being given to and received by the indorsee in payment of the indorser's indebtedness to the indorsee, the assignments of the notes operated as a *pro tanto* equitable assignment of the original indebtedness, notwithstanding the notes themselves were invalid as corporate obligations, and no acceptance of the assignment was made by the corporation.

ID.—FORM OF EQUITABLE ASSIGNMENT.—In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. If from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Garber, Creswell & Garber, and Hillyer, Stringham & O'Brien, for Appellant.

C. H. Wilson, for Respondent.

HENSHAW, J.—This is an action to enforce a stockholder's liability for his proportion of certain debts of the

corporation. The complaint charged in separate causes of action upon different items of indebtedness. One will serve as a type of all. After the allegations of the corporate existence and capacity of the corporation, the number of outstanding shares and the number of those shares owned by defendant Murray, it is alleged that the corporation became indebted to Alfred D. Bowen "for cash loaned and advanced for its use and benefit in the sum of \$20,000"; that the corporation then made its promissory note as evidence of the indebtedness and promised to repay Alfred D. Bowen the sum of twenty thousand dollars on demand; "that Alfred D. Bowen thereafter and before the maturity of said note, for value received, indorsed the same to this plaintiff and duly assigned to this plaintiff the aforesaid indebtedness of said corporation. The other causes of action charge in similar language upon like indebtedness, also evidenced by promissory notes. Upon the trial the existence and validity of the indebtedness from the corporation to Bowen stood unchallenged. Defendant Murray, however, attacked the validity of the promissory notes. The trial court found in favor of the plaintiff on all the issues, saving that it found that the promissory notes were not duly or at all authorized by the corporation or the board of directors thereof. But still further the court found that the corporation was indebted to Bowen for moneys loaned to it in the amount sued for, and that Bowen duly assigned to the plaintiff this indebtedness. It found defendant Murray liable as a stockholder and gave judgment accordingly.

Appellant's attack is directed against the finding of the assignment by Bowen of the debt due the latter from the corporation. If this finding is supported there is an end to the controversy. Preliminary to the consideration of the question it should be noted that the invalidity of the corporation's notes arose from the fact that Bowen, creditor of the corporation and payee of the notes, was also a director, that as a director he voted for the issuance of the notes, and that without his vote the issuance would not have been ordered. A second fact is that the amounts mentioned in the notes were not, at the times when they were drawn, the full amounts of the indebtedness due from the corporation to Bowen, or phrasing it differently they were in the nature of orders for

a part of the indebtedness or fund due to the creditor at the time they were drawn.

The evidence, and all of the evidence, touching the equitable assignment by Bowen to plaintiff is that the notes were intended to cover the advancements made by Bowen to the corporation, that Bowen was indebted to plaintiff in the amounts evidenced by the promissory notes, and that he indorsed them to plaintiff and delivered them to plaintiff "for payment of advances." Appellant's contention is that "a bill of exchange or draft payable generally, and not out of any particular fund or debt, will not, before acceptance, operate as an assignment to the holder of the bill or draft of a debt due from the drawee to the drawer." (*Lewis v. Traders' Bank*, 30 Minn. 134, [14 N. W. 387]; 4 Cyc. pp. 47, 49.) "That an order drawn on a fund for a part only does not amount to an assignment." (*Moore v. Gravelot*, 3 Ill. App. 442.) That "a bill itself, before acceptance, has no tendency to prove the assignment, but the contrary." (*Cashman v. Harrison*, 90 Cal. 297, [27 Pac. 282].) In argument it is said that a general indorsement, such as these promissory notes bore, affords no evidence of an assignment of any fund or indebtedness, and that the oral testimony failed utterly to show any such assignment. Finally appellant argues, placing much reliance on *Cashman v. Harrison*, 90 Cal. 297, [27 Pac. 282], that a deliberate and established effort to assign would have been inefficacious without the acceptance of the debtor, which acceptance in this case admittedly was not established. But while *Cashman v. Harrison* does support this view, its declarations are at variance with the earlier decisions of this court. *Wheatley v. Strobe*, 12 Cal. 92, [73 Am. Dec. 522]; *Pierce v. Robinson*, 13 Cal. 116; *Pope v. Huth*, 14 Cal. 403.) In *Lawrence Natl. Bank v. Kowalsky*, 105 Cal. 42, [38 Pac. 518], there was under consideration an inland bill of exchange or draft which had not been accepted. This court said: "An equitable assignment of a specific demand or particular indebtedness may be effected by means of an instrument having the form of an order or bill of exchange drawn by the creditor upon the debtor for its full amount, when such is the intention of the drawer and payee, and it is not essential that the intention to make such assignment should appear on the face of the order or bill of exchange (*Bank*

of *Commerce v. Bogy*, 44 Mo. 13, [100 Am. Dec. 247]; 1 Daniel on Negotiable Instruments, (4th ed.), sec. 20; *Wheatley v. Strobe*, 12 Cal. 92, [73 Am. Dec. 522]), and it was not the intention of this court to overrule the latter case by anything said in the course of the opinion in *Cashman v. Harrison*, 90 Cal. 297, [27 Pac. 283]." Touching the evidence establishing such an equitable assignment it is said in *McIntyre v. Hauser*, 131 Cal. 11, [63 Pac. 69]: "In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. If from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place." We have before us, then, a case where the *bona fide* creditor of a corporation takes from it promissory notes evidencing its debt to him, with a belief in the validity of the notes, and passes them on in due course of business to his creditor, the notes being given to and received by the indorsee in payment of the indorser's indebtedness to the indorsee. The assignments of the notes, so far as Bowen and the plaintiff were concerned, carried with them the original indebtedness. (*Redington v. Cornwell*, 90 Cal. 63. [27 Pac. 40]; *Knowles v. Sandercock*, 107 Cal. 640, [40 Pac 1047]; 7 Cyc. 816.) The intent of the parties—of Bowen on the one hand to assign and of the plaintiff on the other to accept the assignment of the corporation indebtedness—thus clearly evidenced by the transaction between them, is not affected by the fortuitous circumstance that the notes themselves were invalid as corporation obligations. They still had validity, not as negotiable instruments, but as evidencing the contract between Bowen and the plaintiff, and this contract amounted to a valid equitable assignment. First, since no precise form of words or writing is necessary to the establishment of an equitable assignment, it mattered not whether the notes were or were not the valid obligations of the corporation. They still afforded evidence of what, as between themselves, the plaintiff and the witness Bowen proposed to do and did with the indebtedness owed to the latter by the corporation. Second, as we have seen, the acknowledgment and acceptance by the corporation of the assignment of the debt of Bowen to plaintiff was not essential to the validity of the assignment, and, third, while authority is

divided upon the question of the equitable assignability of a portion of a debt or fund before acceptance, the sounder view we take it is that expressed in 1 Daniel on Negotiable Instruments, sec. 23, and upon this point we cannot do better than to quote the learned author at length:

“This doctrine is clearly correct in so far as it applies to legal assignments. The holder of the bill or order cannot sue the drawee-at-law in his own name, as he would thus divide the cause of action, and leave a balance due the creditor. He cannot sue in the creditor’s name, except by his consent, as, at best, he is only entitled to a part of the debt due him. But it has been held in numerous cases, and we think should now be regarded as law, that a non-negotiable order for part of a fund operates as an equitable assignment *pro tanto*. Clearly this is the case when it has been accepted or assented to by the drawee. And when it has not been accepted, our own view is this: that a non-negotiable order for part of a fund does operate as an equitable assignment *pro tanto* as between the drawer and payee, because obviously so intended. But as between drawer and payee on the one side, and the drawee on the other, it creates no obligation on the latter to pay it, as he has a right to insist on an integral discharge of his debt. And if the creditor give a subsequent order for the whole amount, he may pay it with impunity, as he thus discharges his debt in its entirety at once. But if the payee or indorsee goes into equity, or the parties are brought therein by any proceeding, so that all of them are before the court, the holder of the order may enforce it as an equitable assignment as against all subsequent claimants, whether by assignment from the drawer, or by legal process served upon the drawee.

“Mr. Justice Story has stated the principle, as we conceive it, more correctly in his treatise on Equity Jurisprudence, than in the cases hitherto cited; and he there declares that, while a draft for part of a fund operates no assignment at law, the same principle applies in equity to a draft for part of a fund that applies to a draft for the whole, and that ‘in each case a trust would be created in favor of the equitable assignee of the fund, and would constitute an equitable lien upon it.’ We can perceive no sufficient reason for excluding a bill for a part of a fund, whether it be negotiable or not,

from operating as an equitable assignment within the limitations of the text. It would only carry out to its legitimate sequence the theory of the bill."

For these reasons the judgment and order appealed from are affirmed.

Melvin, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[Sac. No. 1969. Department One.—January 2, 1913.]

CHARLES OLAINE, Appellant, v. CHARLES MCGRAW et al., Respondents.

MINES—QUARTZ LOCATION OVERLAPPING PRIOR VALID PLACER CLAIM—

FINDINGS—EVIDENCE—WANT OF DISCOVERY—FAILURE TO DO ASSESSMENT WORK.—In an action to recover the possession of land included within a quartz mining location, the evidence is held sufficient to support the findings that the plaintiff's quartz location overlapped a portion of a certain placer mine which, for upward of ten years, had been owned and continuously worked by one of the defendants and his predecessors in interest; that at the time said quartz claim was located by the plaintiff, there was no discovery made by plaintiff of gold-bearing rock or mineral in place, and that the plaintiff had failed to do the annual assessment-work on his claim.

ID.—PLEADING—ANSWER DENYING PLAINTIFF'S OWNERSHIP—EVIDENCE OF PRIOR PLACER CLAIM.—In such action, the defendants, under an answer denying the plaintiff's ownership as well as all the other allegations of the complaint, may offer evidence of their ownership and occupancy under the prior placer location, without specifically pleading such defense.

ID.—ESTABLISHMENT OF HIGHWAY OVER PLACER CLAIM.—The action of the board of supervisors in declaring a portion of such placer mining claim to be a public highway could not affect the claim further than to establish an easement over it to the extent stated, for public use as a highway. In such action, evidence of the establishment of the highway is immaterial.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—NECESSARY SHOWING.—A new trial cannot be granted on the ground of newly discovered evidence, in the absence of a showing that the proposed evidence was

not known to the moving party at the time of the trial, or, if not then known, could not with reasonable diligence have been discovered and produced at the trial.

APPEAL from an order of the Superior Court of Siskiyou County refusing a new trial. James F. Lodge, Judge.

The facts are stated in the opinion of the court.

B. K. Collier, and James D. Fairchild, for Appellant.

Taylor & Tebbe, for Respondents.

ANGELLOTTI, J.—This is an action for damages and for an injunction. Plaintiff alleged that ever since June 15, 1909, he has been entitled to the exclusive possession of certain described territory known as the Eastern Star Quartz Mining Claim, the same constituting a quartz mining location chiefly valuable for the gold-bearing rock and earth contained therein, and that defendants on or about October 3, 1910, wrongfully entered thereon, took and appropriated to their own use large quantities of such rock and earth, and are continuing so to do, to his damage in the sum of one hundred dollars; that defendants threaten to continue to so do, and that the consequent injury to plaintiff will be irreparable. Defendants by their answer denied the allegations of the complaint, and further alleged that defendant Charles McGraw, Jr., is and ever since October 3, 1910, has been, the owner, in the possession of and entitled to the exclusive possession of that certain quartz mining claim known as Leroy Fraction, which includes a portion of the land claimed by plaintiff to be within the limits of his alleged Eastern Star location.

The case was tried by the court without a jury, and the findings were in favor of defendants. Judgment was given that plaintiff take nothing by his action. This is an appeal only from an order denying plaintiff's motion for a new trial. We are, therefore, here concerned with such points only as are available on motion for a new trial.

Plaintiff's attempted location of a quartz mining claim was made June 15, 1909. The land described in the notice was a piece of land triangular in shape, running northwest and southeast, six hundred feet wide on the northwest and run-

ning to a point at the southeast end. The plaintiff claimed that prior to making his location he made a sufficient discovery of gold-bearing quartz in place in the northwesterly portion of this triangular piece.

The trial court found that plaintiff's claim overlapped a portion of a certain placer mine which had been, since the year 1888, owned and continuously worked by Charles McGraw, and his predecessor in interest, and that the contact between the said claims comprised a piece of land on the west border of said placer mine about one thousand five hundred feet in length and about sixty-six feet in width. It is stated generally in appellant's brief that this finding is not supported by the evidence, but it is not pointed out wherein it lacks such support. An examination of the record discloses that there was ample evidence to sustain a conclusion that plaintiff's alleged claim overlapped to the extent stated a portion of the Ashantee Placer Mining Claim, located by James McGraw on May 16, 1888, and transferred by said James McGraw to Charles McGraw on February 6, 1903, and that said claim had been continuously worked by Charles McGraw and his predecessors ever since the year 1888.

It was found that at the time said quartz claim was located by plaintiff, there was no discovery made by plaintiff of gold-bearing rock or mineral in place. This finding is earnestly attacked as being without sufficient support in the evidence. We have carefully read so much of the record as bears upon this point, and while it may be that a contrary finding would have been amply supported, we are satisfied that it cannot be held that there is not sufficient support in the evidence for the conclusion reached by the trial court. It must be borne in mind that the alleged discovery was purely a surface discovery, plaintiff not opening up the ground at all, but basing his conclusions almost entirely upon the appearance of the surface. The testimony of witnesses for defendants, who subsequently examined the claim, was squarely opposed to that of plaintiff and his witnesses as to "croppings, iron, quartz or anything that would indicate mineral." The situation was such that we cannot say that the court was not warranted in failing to give any particular weight to plaintiff's testimony that he "found gold in rock" that he took from the surface at his alleged point of discovery. As to this finding

we have at best simply the usual situation of conflicting evidence, upon which a finding either way would be held by an appellate court to be sufficiently sustained by evidence.

The fourth and fifth findings, which are also attacked as being without support in the evidence, are, so far as material, substantially as follows: Plaintiff never performed any work upon his claim except as hereinafter stated. During 1909 and 1910 he authorized one Butler to work thereon, on his (Butler's) own account, with the understanding that he (plaintiff) could claim Butler's work as his assessment work on said Eastern Star claim. Butler associated Charles McGraw, Jr., with him in the work, and they made a great number of small excavations upon the land described in plaintiff's complaint, most of which were made upon the McGraw placer claim. All the work done upon such placer claim by Butler and McGraw, Jr., was done under an agreement with McGraw, Sr., by which the latter was to receive twenty per cent royalty upon all gold or precious minerals extracted therefrom. They discovered "upon said placer mine stringers of quartz and extracted therefrom the sum of \$2,600, twenty per cent of which was paid to defendant, Charles McGraw." This work and labor was performed at a point about six hundred feet from said "alleged discovery." As to these findings, the evidence was clearly sufficient to support the conclusion that the work and labor of Butler and McGraw, Jr., was done more than three hundred feet from plaintiff's "alleged discovery." The testimony was such that we cannot hold that it does not sufficiently support the conclusion that most of their work was on the land covered by McGraw's placer claim and that the discovery made by them was made on such land. In no other material respect does plaintiff claim these findings to be unsupported by the evidence.

The sixth finding is to the effect that on or about October 10, 1910, with the consent of McGraw, Sr., McGraw, Jr., located a quartz mine, known as the Leroy Fraction, based on the discovery referred to in the fourth and fifth findings, and that such Leroy Fraction was properly marked on the ground, etc. We are unable to see wherein this finding is without sufficient support in the evidence given by Charles McGraw, Jr., and in the recorded copy of the notice of location.

There was no error in permitting defendants to show the facts as to the ownership and occupancy by McGraw of the Ashantee placer mine, although they had not specifically set up the same as a defense in their answer. They had denied plaintiff's allegation of ownership, as well as all the other allegations of his complaint, and evidence of McGraw's ownership and occupancy of the land embraced in the Ashantee placer claim was clearly relevant and material evidence in support of such denials.

We are unable to perceive the materiality of certain proposed evidence to the effect that on January 5, 1909, the board of supervisors of Siskiyou County declared twelve feet of the bed of Ash Creek, included in McGraw's placer mining claim, to be a public highway. Such action by the board of supervisors could not affect the claim further than to establish an easement over the same to the extent stated, for public use as a highway. The trial court did not err in excluding the proffered evidence.

Various affidavits were presented on the motion for a new trial, in support of the claim that the motion should be granted on the ground of newly discovered evidence. There is absolutely no pretense of a showing that any of the proposed evidence set forth in the affidavits was not known to plaintiff at the time of the trial except the proposed evidence of Mr. H. N. Bean as to a conversation with one of defendants' witnesses after the trial, or, if not then known, could not with reasonable diligence have been discovered and produced at the trial. It is, of course, well settled that such a showing is essential to warrant the granting of a new trial on the ground of newly discovered evidence. The provision of the Code of Civil Procedure on the subject is that a new trial may be granted on account of "newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial." (Code Civ. Proc., sec. 657, subd. 4.) It cannot reasonably be claimed that the proposed evidence of Mr. Bean was of such a nature as to require the trial court to grant a new trial on this ground.

The order denying a new trial is affirmed.

Shaw, J., and Sloss, J., concurred.

[Sac. No. 1965. Department One.—January 3, 1913.]

**EMANUEL GJURICH, Appellant, v. FANNY FIEG,
Respondent.**

EMPLOYER AND EMPLOYEE—PRESUMPTIONS—PROMISE TO PAY FOR SERVICES—EVIDENCE TO REBUT—SERVICES INTENDED AS GRATUITOUS.—

Ordinarily the law will imply a promise to pay for services rendered and accepted. This rule is founded on a mere presumption of law, and may be rebutted by proof of a special agreement to pay therefor a particular amount or in a particular manner, or by proof that the services were intended to be gratuitous, or even by particular circumstances from which the law would raise the counter presumption that the services were not intended to be a charge against the party who was benefited thereby.

ID.—PARTIES LIVING AS HUSBAND AND WIFE—INFERENCE OF GRATUITOUS RETURN OF SERVICES.—

In the absence of an express agreement for compensation, the fact that a man and a woman, although not married to each other, had gone to certain premises belonging to her to live together and for ten years had lived together as husband and wife, mutually carrying on the business of a roadhouse and saloon, is sufficient to support the inference that no compensation in money was contemplated for any services rendered by him in and about the conduct of the business.

ID.—CROSS-EXAMINATION—EVIDENCE OF COHABITATION.—

In an action by him to recover for such services, after he had testified on his direct examination that he had worked for the defendant under circumstances from which an obligation to pay for his services would be implied, it was proper cross-examination to permit the defendant to inquire concerning his cohabitation with her.

ID.—EVIDENCE OFFERED BY APPELLANT.—

An appellant cannot complain of the admission of evidence which was offered by himself.

ID.—REMARK OF COURT—EFFECT OF EVIDENCE.—

A remark made by the court, as to his recollection of the effect of certain findings in another action that were subsequently offered in evidence, is without prejudice, if the findings themselves showed that the court's recollection was accurate.

ID.—INSTRUCTIONS—MATTERS REFERRED TO FOR ILLUSTRATION.—

It was not error for the court, in its instructions to the jury, by way of illustration of some of the circumstances which would justify an inference that services had been rendered gratuitously, to refer to the case of a son working for a father, or a woman for a supposed husband.

ID.—PLEADING—DENIAL OF INDEBTEDNESS AND EMPLOYMENT.—In such action, the mere denial of indebtedness and employment raised an issue, on which, in the absence of an express agreement, the relations of the parties became material, and justified instructions referring to their cohabitation, although such fact had not been pleaded.

ID.—PAYMENT—SEXUAL INTERCOURSE.—Where the jury were properly instructed as to the effect of the relations of the parties as tending to show that the plaintiff's services were intended to be gratuitous, it was not error for the court to refuse an instruction, requested by the plaintiff, that sexual intercourse would not constitute payment of plaintiff's claim.

APPEAL from a judgment of the Superior Court of San Joaquin County. C. W. Norton, Judge.

The facts are stated in the opinion of the court.

A. H. Carpenter, for Appellant.

Webster, Webster & Blewett, for Respondent.

SLOSS, J.—The action was brought to recover a balance of five thousand dollars, claimed to be due to plaintiff from defendant "upon an open book account and an open, mutual and current account," for work and services rendered by plaintiff at defendant's request, "for which said services the defendant promised and agreed to pay plaintiff the said balance of said account and the amount so alleged to be due thereon." The answer denied the indebtedness. A trial before a jury resulted in a verdict in favor of the defendant. The plaintiff appeals from the judgment, bringing up the evidence under the method provided in section 953a of the Code of Civil Procedure.

1. There is no merit in the contention that the verdict is not sustained by the evidence. There was testimony tending to show that in 1897 the defendant, pursuant to plaintiff's advice, purchased a small tract of land a few miles from Stockton, and established a roadhouse and saloon there. Thereupon she and the plaintiff took up their residence upon the premises and lived there for some ten years. During this time the plaintiff was engaged in working on the place, de-

voting his time to the care of the grounds, planting of trees and vines, construction of arbors, building additions to the house, and other things. The defendant tended bar, and took care of the saloon. From the outset of their residence on the premises, and for a number of years thereafter, the parties occupied the same bedroom, living together as husband and wife. An offer of marriage had been made by plaintiff to defendant, and accepted by her. No marriage was ever solemnized, however. These relations commenced and continued without any specific agreement for the payment of wages by defendant to plaintiff. Gjulich was given money from time to time for the purpose of purchasing articles and supplies required on the place, and out of this money he retained what he desired for his own use.

The foregoing statement is based, in large part, upon the testimony of the defendant. In many particulars, the evidence offered by plaintiff was in conflict with that of the defendant. But where the verdict is attacked for insufficiency of evidence, our power begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which, in and of itself, would support the conclusion reached by the jury. If, on any material point, the testimony is in conflict, it must be assumed that the jury resolved the conflict in favor of the prevailing party. For this reason we attach no importance to an alleged written agreement by the defendant to pay plaintiff three dollars per day. The defendant denied the execution of the writing, and her denial was enough to authorize the jury to find, as it impliedly did, that the agreement relied upon had never been made. The same observation may be applied to the claim of an antecedent oral agreement to pay wages.

The facts, as hereinabove stated, clearly justified the verdict. Ordinarily, no doubt, the law will imply a promise to pay for services rendered and accepted. But this rule is founded "upon a mere presumption of law, and is liable to be rebutted by proof of a special agreement to pay therefor a particular amount or in a particular manner, or by proof that the services were intended to be gratuitous, or even by particular circumstances from which the law would raise the counter presumption that the services were not intended to be a charge against the party who was benefited thereby."

(*Moulin v. Columbet*, 22 Cal. 508.) Thus, where there is a blood relationship between the parties, it may well be inferred, in the absence of a direct understanding to the contrary, that pecuniary compensation was not expected by the one performing the services. (*Page v. Page*, 73 N. H. 305, [6 Ann. Cas. 510, 61 Atl. 356]; *Murdock v. Murdock*, 7 Cal. 513; *Friermuth v. Friermuth*, 46 Cal. 42; *Crane v. Derrick*, 157 Cal. 667, [109 Pac. 31].) "The question is one that must be determined on the circumstances of the particular case, the question in each case being whether it can reasonably be inferred that pecuniary compensation was in the view of the parties at the time the services were rendered." (*Crane v. Derrick*, 157 Cal. 667, [109 Pac. 31].)

These principles were embodied in the instructions to the jury. The general verdict in favor of the defendant carried with it implied findings that there had been no express agreement, oral or written, for compensation, and that, in view of the circumstances under which the parties had gone to the land, and lived and labored together there, the plaintiff had rendered services without any expectation of pecuniary payment therefor. These were legitimate conclusions from the evidence. The testimony of the defendant was direct to the point that there had been no express agreement for compensation. And, if that were so, the fact that the parties had gone to the premises to live together and had lived together as husband and wife, afforded a sufficient basis for the inference that compensation in money for any services rendered was not contemplated. The relation existing, although meretricious, may be considered as illustrating the purpose and expectation with which work was done by each.

2. The court did not err in permitting the defendant, on cross-examination of the plaintiff, to inquire concerning his cohabitation with the defendant. The plaintiff, on direct examination, had testified that he had worked for defendant under circumstances from which an obligation to pay for his services would be implied. The relations between the parties had a tendency to rebut this implication, and formed, therefore, a proper subject for cross-examination. The questions, then, did not relate to collateral matters, and the defendant was not, as is claimed, bound by plaintiff's answers, and thus

precluded from asking further questions for the purpose of impeachment.

The same reasoning on which the cross-examination of plaintiff is held to be proper justifies the rulings of the court permitting the defendant to testify concerning her relations with plaintiff.

3. In 1907 the defendant conveyed the premises to plaintiff. Thereafter she brought an action to set aside the conveyance, alleging that she had been induced to execute it by means of fraud practiced by the plaintiff. The value of the property was estimated to be two thousand dollars. The plaintiff, in order to account for his failure to credit the defendant with this transfer as a payment of two thousand dollars on his claim, offered in evidence the judgment, rendered in the action brought by defendant against him, and setting aside the said conveyance. The judgment was not then final, although it has since been affirmed in this court. (*Fieg v. Gjurich*, 163 Cal. 740, [127 Pac. 49].) It is now argued that the judgment was not admissible, because the cause in which it was rendered was still pending on appeal. But of course the appellant, having offered the evidence himself, cannot complain of its admission.

It is also claimed that the court erred in admitting the findings upon which the judgment in *Fieg v. Gjurich* was based. But this evidence, too, was offered by the plaintiff. He first offered the judgment alone. The defendant insisted that the entire judgment-roll should go in. The court expressed the view that all should be offered. Thereupon the plaintiff, acting, as his counsel said "under the advice of the court," offered the findings and the decree. If the findings were not admissible, the plaintiff waived his right to object by offering them himself. He might have preserved his point by insisting upon his offer of the judgment alone, and taking an exception to a ruling excluding it. But, instead of so doing, he offered the findings himself.

In the course of a prior colloquy, in which counsel were seeking to agree on a stipulation concerning the former judgment, the court stated its recollection to be that the findings had been that the deed was obtained by fraud. Inasmuch as the findings themselves, showing the court's recollection

to be accurate, were subsequently admitted, the plaintiff could have suffered no prejudice from this remark.

It was not misconduct for defendant's counsel, in arguing to the jury, to refer to the matters covered by the findings which were before the jury.

4. We see no error in the instructions. As we have already intimated, they covered with fullness and accuracy the propositions of law governing the principal issue in the case. It was not improper for the court to refer to the case of a son working for a father, or a woman for a supposed husband. These were mere illustrations of some of the circumstances which would justify an inference that services had been rendered gratuitously, and were appropriate as aids to the jury in determining whether compensation was expected in the case at bar, which was in some degree parallel to those suggested.

It is argued that instructions referring to the alleged cohabitation of the parties were erroneous, because they dealt with matters that had not been pleaded. But the mere denial of indebtedness and employment raised an issue, on which, in the absence of an express agreement, the relations of the parties became material.

The court refused to charge, as requested by plaintiff, that sexual intercourse would not constitute payment of plaintiff's claim for wages. This instruction had no application to any issue in the case. The defendant did not rely upon the cohabitation as payment. Her contention was merely that her relations with plaintiff were to be considered in determining whether a claim for wages had ever existed. The offered instruction could only have served to confuse the jury.

Certain instructions relative to the statute of limitations are criticised by plaintiff. Their effect was to limit any recovery to the amount earned in the statutory period next preceding the commencement of the action. We think the instructions were correct, but the verdict found makes it unnecessary to discuss the particular objections urged. The jury found, in effect, that there never had been any liability on defendant's part to pay wages to plaintiff. It is, therefore, immaterial whether the court was right or wrong in directing them that, if they found a liability, they could award wages for only a given time.

There are no other points of sufficient consequence to require notice.

The judgment is affirmed.

Angellotti, J., and Shaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 5792. In Bank.—January 4, 1913.]

**STANDARD OIL COMPANY (a Corporation), Appellant,
v. JOSEPH SLYE et al., Respondents.**

LEASE—RECORDING ASSIGNMENT OF UNRECORDED LEASE—NOTICE OF LEASE.—Where there had been several assignments of an unrecorded lease, the recordation of one of the intermediate assignments, the parties thereto being strangers to the record title, did not give notice of the contents of the lease.

ID.—OCCUPATION BY SUBLESSEE—CONSTRUCTIVE NOTICE OF TERMS OF SUBLEASE.—The open and notorious occupancy of oil lands by a sublessee thereof, claiming under a prior sublessee, is in itself sufficient to put on inquiry a corporation which subsequently purchased the land from the lessor and became the assignee of the rights of the intermediate lessees, and to charge it with constructive notice of the terms of the occupant's sublease.

ID.—ATTEMPT TO ACQUIRE INTEREST OF SUBLESSEE—ESTOPPEL—KNOWLEDGE OF RIGHTS.—The fact that such corporation, almost contemporaneously with the assignment of the leasehold interest of the sublessee under whom such occupant claimed, endeavored to acquire his rights, does not operate to estop it from disputing such rights, but is evidence tending to show that it had actual knowledge of the terms of the occupant's sublease.

ID.—COVENANT FOR RENEWAL RUNS WITH LAND.—A covenant in a lease for a renewal thereof is for the direct benefit of the estate granted, within the meaning of section 1462 of the Civil Code, and runs with the land, and is binding upon one holding in privity of estate with the assignee of the lessor.

ID.—ASSIGNEE OF LESSEE—PRIVITY OF ESTATE.—An assignee of the interest of a lessee, by accepting rent from the claimants under a sublease, becomes in privity of estate with them.

ID.—ACQUISITION OF ESTATE OF LESSEE AND LESSOR AFTER SUBLETTING —MERGER.—Where a lessee, after subletting, assigns to a grantee

of the lessor, who collects from the sublessee the rent reserved in the sublease, such grantee comes in as an assignee of the reversion and not as the owner of the fee, there being no merger of the term of the original lessee in the estate of his lessor.

ID.—FAILURE TO DEMAND RENEWAL OF LEASE AFTER LESSOR OBTAINED ESTATE OF LESSEE.—Where a lessee, having a right to a renewal of his lease upon making a demand therefor, executes a sublease, the terms of which did not require the sublessee to make such demand, and afterward assigns the lease to a grantee of the lessor, the sublessee does not forfeit his right to a renewal by a failure of the assignee of the lessee to demand a renewal from itself as owner of the fee.

ID.—LEASE OF MINING GROUND BY CORPORATION—NONRATIFICATION BY STOCKHOLDERS—REPEAL OF STATUTE REQUIRING RATIFICATION—SUBSEQUENT ACTS VALIDATING LEASE—ESTOPPEL.—A mining corporation, which executed a lease of a part of its mining ground at a time when the statute (Stats. 1897, p. 96), was in force requiring such a lease to be ratified by its stockholders, and which, after the repeal of such statute in 1905 (Stats. 1905, p. 74), treated the lease as valid and collected the rent reserved thereby for a period of years, is estopped to assert the invalidity of the lease due to its nonratification by the stockholders.

APPEAL from a judgment of the Superior Court of Fresno County and from an order refusing a new trial. George E. Church, Judge.

The facts are stated in the opinion of the court.

Pillsbury, Madison & Sutro, and L. L. Cory, for Appellant.

Sullivan & Sullivan, and Theo. J. Roche, and Frank H. Short, for Respondents.

MELVIN, J.—Appeal from a judgment against plaintiff and from an order denying its motion for a new trial. The action was for the possession of ten acres of land situated in the northeast quarter of section 28, township 19 south, range 15 east, M. D. B. M., in Fresno County, California. Plaintiff's title as owner in fee is undisputed. Defendant, however, claims the right to extract oil from the land until the thirtieth day of September, 1919, paying to plaintiff one-third of the gross product obtained. Defendant claims under a contract from a prior sublessee, the latter in turn

holding under a lessee of plaintiff's grantor of the fee. All parties to the controversy deraigned title from the Hanford Oil Company, a corporation, which had owned all of section 28 above mentioned. On September 30, 1899, Hanford Oil Company leased to S. N. Griffith the northeast quarter of section 28 for a term commencing October 1, 1899, and ending September 30, 1909, the contract providing that Griffith was to form a corporation to assume his obligations under the lease. In accordance with the terms of said lease Griffith organized the "28 Oil Company" and transferred his lease to that corporation. By the said lease the corporation was authorized and empowered to sublet the whole or any part of the land in subdivisions of not less than five acres. The lease also contained this paragraph:

"Said corporation may and shall have the right, privilege and option to demand and receive from the party of the first part at any time after the first day of October, 1907, and before the first day of October, A. D. 1908, a second lease and demise of all the land above described for an additional term of ten years, to commence at the expiration of the term hereby created, upon the same terms, conditions, stipulations and limitations, and for the uses and purposes herein made, agreed upon and set out."

By paragraph 15 of the lease it was provided that under certain conditions the rights of the corporation should cease, but this paragraph also contained the following language:

"Provided that if any part of the said land shall be in the actual possession and occupation of any person under and by virtue of any sublease executed in accordance to the provisions hereof, the term of such person under such sublease and his possession of said part of said land, and his right of possession thereof, shall not terminate, nor be at an end, or be in any manner affected by the foregoing provisions of this clause, numbered fifteen, and the term of such person under such sublease and his possession and right of possession of such part of said land shall immediately cease and determine, and such person shall lose all right to the possession of such part of said land, so held by him, upon failure or refusal by such person to keep any of the stipulations, agreements and covenants of the sublease by which he holds such part of said land, and the party of the first part shall there-

upon be immediately entitled to the possession of all of said land so held by such person."

On October 31, 1899, 28 Oil Company leased to Independence Oil Company the southwest quarter of the northeast quarter of section 28. This lease required among other things the boring of a well by the Independence Oil Company each year of its term. The duration of the term and the option for a further term of ten years were expressed in the leasing contract in substantially the same words as those employed in the original lease from Hanford Oil Company. This lease also contained language substantially identical with that of paragraph 15 of the original lease from Hanford Oil Company. It was evidently contemplated by both of these leases that the land should be developed at a certain rate per year; that the work of the sublessees should be counted as a part of the necessary development; and that the term of a sublessee was not to cease or determine by reason of any forfeiture by his immediate lessor. A lease was made by Independence Oil Company on July 18, 1902, to W. L. Harper. This is designated by those on both sides of this controversy as the "Harper lease." Defendant Slye appears as the last sublessee under the rights conveyed by the Harper lease. The first paragraph of this lease gave to Harper the exclusive right to drill for oil and to extract and remove the same and any other merchantable minerals existing on the ten acres of land in question. By the second paragraph it was provided that two-thirds of the product from the land should be retained by Harper (the party of the second part). The fourth paragraph was in part as follows:

"The term of this agreement shall be the unexpired term of the lease between the 28 Oil Company and the Independence Oil Company and the renewal thereof as therein provided. And said party of the second part hereby agrees that he and his assigns, in consideration of the foregoing covenants, of the party of the first part, will drill upon said land, and complete within the terms and conditions of the said lease of the 28 Oil Company to the Independence Oil Company one well at his own expense, on or before the first day of October, 1902, and at least one well each year thereafter as provided in said lease."

It also contained this language:

“This agreement is based upon and intended as a substitute for that certain application and resolution of June 23rd, 1902, between the Independence Oil Company of Coalinga and W. G. Griffith, said Griffith having assigned his right to drill on said ten acres of land of said company to the said W. L. Harper.”

W. G. Griffith's original application for a sublease (mentioned in the last quotation) recited as a condition of such sublease: “That one well was to be drilled by him on or before the first day of October, 1902, and a well each year thereafter for the period of the term of the Independence, to wit, the unexpired term, and the renewal thereof.” Standard Oil Company obtained a deed from Hanford Oil Company to the whole of section 28 on May 7, 1908. Previously Standard Oil Company had received assignments from successors of 28 Oil Company, including one from Independence Oil Company, dated March 26, 1907, of its interest in the lease.

The court found that at the time plaintiff acquired title to the real property here involved, said plaintiff knew that Slye's predecessors were in possession of the land extracting oil therefrom, “and had and claimed to have the exclusive right to drill upon said real property, hereinabove lastly described, and to extract oil, petroleum, and other merchantable minerals therefrom, under and pursuant to the terms of said agreement aforesaid, executed by said Independence Oil Company of Coalinga, said corporation, to said W. L. Harper, for and during the whole of said term, ending with the 30th day of September, 1919.” It was also found that the Independence Oil Company bound itself to renew and continue the Harper lease for the additional period of ten years, and that plaintiff took its assignment of the lease from the said Independence Oil Company subject to the contract with W. L. Harper, and bound by the obligation to renew the term of Harper or his assigns and to extend the same for ten years—namely, to the thirtieth day of September, 1919. The court found that Roberts and others who had acquired the Harper interest had spent large sums of money in developing the property which they would not have expended except

under the assurance that they should hold the land for the long term.

Appellant's contentions are: 1. That when it purchased the interest of Independence Oil Company it had no notice, actual or constructive, of the claim by respondent or his predecessors of a right to remain in possession of the land beyond September 30, 1909; 2. That any covenant by Independence Oil Company to demand a new lease for Harper's benefit could not bind Standard Oil Company as purchaser of the fee or of the leasehold interest of Independence Oil Company; 3. That Independence Oil Company could not grant a term beyond that acquired under its own actual lease, nor did it covenant to demand a new lease for Harper; and 4. That the Harper lease was void because not ratified by the stockholders of the grantor according to the law in force at the date of its execution.

It is conceded by respondent that the Harper lease was not of record, although one of the intermediate assignments thereof was recorded. This was the assignment of the lease from Mt. Pelee Oil Company to George D. Roberts; but the parties to this assignment, being strangers to the record title, the recording thereof gave no notice of the contents of the lease. (*Garber v. Gianella*, 98 Cal. 529, [33 Pac. 458]; *Bothin v. California Title Ins. Co.*, 153 Cal. 724, [96 Pac. 500].) There was therefore no such constructive notice as would have been presumed from a recorded lease from the Independence Oil Company to Harper. Plaintiff, however, was charged with actual notice of the occupancy of the ten acre tract by Harper and his assigns and it was also constructively apprised of the contents of the lease from Hanford Oil Company to S. N. Griffith and the recorded assignments thereof carrying with them the right to sublease the property wholly or in parts for the residue of the term and the renewal thereof. The sublessees under the Harper lease were notoriously in possession of the property. "The first well was brought in Christmas morning, 1902," said witness Condon, secretary of the Stockholders Oil Company. George D. Roberts, president of that corporation, testified that he promptly served upon Hanford Oil Company and 28 Oil Company notices of the completion of this well as per contract, and demanded the unexpired term of their lease

to the Independence Oil Company, plus the renewal. Shannon, upon whom Roberts says he served these notices, was the general manager of the 28 Oil Company when Roberts went upon the ten acre strip. He knew all about the activity of Roberts, and knew long before the transfer was made to Standard Oil Company from 28 Oil Company that Roberts and his assigns asserted right to possession of the property until 1919. But appellant insists that, while there may have been evidence of the fact that Standard Oil Company had notice of the right to the long term claimed under the Harper lease, before the purchase of the interests of Hanford and 28 companies, no notice was given to it prior to its purchase of the lease of Independence Oil Company, and that it could not therefore be charged with notice of what that company had done. We think, however, that the notorious occupancy of the ten acre tract by those holding under the Harper lease was in itself sufficient to put Standard Oil Company upon its inquiry. Knowing the power of the Independence Oil Company to sublease for the residue of ten years and to acquire an additional ten years for its subtenants by a mere demand, it was bound to inquire the terms under which Independence Oil Company had surrendered this land. The subsequent conduct of the plaintiff shows that it recognized the claims of those asserting rights under the Harper lease. Its authorized agents endeavored several times, within a few months subsequent to the purchase of the leasehold of Independence Oil Company, to acquire the rights of the claimants of the Harper interest, but failed to agree upon terms, not because of the asserted privilege of the latter to occupy the premises until 1919, but because of difference of opinion regarding the amount which would fairly compensate the owner of the sublease. Of course such conduct does not operate as an estoppel against Standard Oil Company, but it does show that almost contemporaneously with the assignment from Independence Oil Company, Standard Oil Company acted as a corporation having actual knowledge of the terms of the Harper lease. The court's finding that the plaintiff bought the lease of Independence Oil Company with notice of the Harper lease was supported by the evidence.

Plaintiff insists that the covenant to renew the lease is a personal one not running with the land. In this behalf sections 1461 and 1462 of the Civil Code are cited. The former provides: "The only covenants which run with the land are those specified in this title, and those which are incidental thereto." And the latter is as follows: "Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land." Plaintiff's position is that such a covenant as the one here considered is not made for the benefit of the property but, on the contrary, is an injurious limitation upon the lessor's power of repossession. Even if this position were correct the plaintiff would be bound in conscience to fulfill the covenant. (*Bryan v. Grosse*, 155 Cal. 135, [99 Pac. 499].) But it was a covenant running with the land, and by purchasing the interest of the Independence Oil Company and accepting rent from the claimants under the Harper lease plaintiff placed itself in privity of estate with them. This covenant, running as it did with the land, was binding upon one holding in privity of estate with the assignee of the lessor. (*Salisbury v. Shirley*, 66 Cal. 225, [5 Pac. 104].) In the early case of *Laffan v. Naglee*, 9 Cal. 675, [70 Am. Dec. 678], this court held that a covenant to give the lessee a preference, in case the lessor should decide to sell the property, was a covenant running with the land. In the case of *Lyford v. North Pac. Coast R. R. Co.*, 92 Cal. 95, [28 Pac. 103], referring to the covenant there considered, the court used this language: "It is obvious that the agreement to continue to operate the railway is not a covenant which, under the code, would run with the land. It is not a covenant for the direct benefit of the property, i. e., the estate granted, as required by section 1462 of the Civil Code." This interpretation of the section brings the covenant here under review directly within the meaning of the statute, because obviously a covenant for a renewal of a lease is for the direct benefit of the estate granted. In *Taylor on Landlord and Tenant*, the rule is thus stated, at section 262: "The right of renewal constitutes a part of the tenant's interest in the land, and so a covenant to renew is binding upon the assignee of the reversion. So the grant of an additional term or of a right to purchase is, for many pur-

poses, to be considered a continuation of the former lease; and if there is nothing in the lease to show that such right or renewal was intended to be confined personally to the lessee, it will inure to his assignees or executors without these being particularly named. Covenants running with the land are divisible, and will bind the assignee of a part of the estate demised, in respect to the parcel assigned to him, as to repair, or to pay rent of the part occupied by him. (Where a covenant running with the land is divisible, if the entire estate in different parcels of the land passes by assignment to different individuals, the covenant will attach upon each parcel *pro tanto*; and the assignee of each parcel will be answerable for a proportionate part of the common burden, and will be exclusively liable for the breach of any covenant which related to his part alone.)” One of the cases cited in this behalf by Taylor is *Piggott v. Mason*, 1 Paige Ch. (N. Y.) 413, decided by Chancellor Walworth. This decision is frequently mentioned and followed in the opinions bearing on this subject. In it the original lessor covenanted with the lessee and his assigns to renew the lease at the expiration of the term upon a fair valuation by appraisers. Subleases were made by assignees of the original lessee’s interest (which had been sold upon execution). In these subleases the sublessors covenanted that sublessees should have the renewal upon the same terms as those upon which they themselves should receive the new lease. The defendant in the action had become by purchase the owner of the reversion and all of the original lessor’s interest, subject to the rights arising under the lease. It was held that a covenant of the lessor to renew the lease was one running with the land, the chancellor saying: “It is well settled, even at law, that the assignee may recover in his own name for a breach of such a covenant, if the breach was committed after the assignment. (*Lametti v. Anderson*, 6 Cow. (N. Y.) 302; *Withy v. Mumford*, 5 Cow. (N. Y.) 137; *Kane v. Sanger*, 14 Johns. (N. Y.) 89; *Grescot v. Green*, 1 Salk. 199.) And it lies either for or against an assignee, although he is not named in the covenant. (*Hyde v. The Dean and Canons of Windsor*, Cro. Eliz. 552.) The assignee of a part of the premises may also recover *pro tanto*, if the covenant be in its nature divisible. (Touchstone, 199; Co. Litt. 385a.)” Other cases holding that such covenants run

with the land are *Leppla v. Mackey*, 31 Minn. 75, [16 N. W. 470]; *Callan v. McDaniel*, 72 Ala. 105; *McDaniel v. Callan*, 75 Ala. 330; *Wilkinson v. Pettit*, 47 Barb. (N. Y.) 234; *Cook v. Jones*, 96 Ky. 286, [28 S. W. 960], (a case holding that even where the original lessee after the sale of his leasehold interest agreed not to demand a renewal, that fact did not deprive the sublessee of his right to a renewal as to that part of the land included within his sublease); *Alford v. Jones*, (Ky.) 30 S. W. 1013; *McClintock v. Joyner*, 77 Miss. 680, [78 Am. St. Rep. 541, 27 South. 837]; *Robinson v. Perry*, 21 Ga. 186 [68 Am. Dec. 455]; *Blount v. Connolly*, 110 Mo. App. 607, [85 S. W. 605]; *Phelps v. Erhardt*, 5 N. Y. Supp. 540, [53 Hun, 630]; *Mitchell v. Young*, 80 Ark. 443 [117 Am. St. Rep. 89, 10 Ann. Cas. 423, 7 L. R. A. (N. S.) 221, 97 S. W. 454], (citing with approval *Bailey v. Richardson*, 66 Cal. 416, [5 Pac. 910]); *Leominster Gas Light Co. v. Hillery*, 197 Mass. 268, [83 N. E. 870], (holding that the reversioner is bound, even without notice, by the contract to renew although the sublease is unrecorded). Other authorities in support of the rule that a transferee of the lessor's interest is bound by a stipulation contained in a sublease are *Connor v. Withers*, (Ky.) 49 S. W. 310; *Kolasky v. Michels*, 120 N. Y. 635, [24 N. E. 278]; *Robinson v. Beard*, 140 N. Y. 111, [35 N. E. 441]; *Buttner v. Kasser*, 19 Cal. App. 755, [127 Pac. 811]; (petition for rehearing denied by this court November 19, 1912). Respondent cites *Bailey v. Richardson*, 66 Cal. 416, [5 Pac. 910], (a case discussed and approved in the very late case of *Buttner v. Kasser*, 19 Cal. App. 755, [127 Pac. 811]), as determinative of the questions here presented. In that case, as here, the plaintiff appeared as the owner of the fee and assignee of the lease. The court held that where a lessee, after subletting, assigns to the lessor, who collects from the sublessee the rent reserved in the sublease, the lessor comes in as assignee of the reversion and not as the owner of the fee, there being no merger of the term of the original lessee in the estate of his lessor. The court said of defendant: "Claiming the benefit of Dore's contract, he is estopped from denying that he has succeeded to his responsibilities." Dore was the assignee of the original lessee and the rights of plaintiff arose under a covenant in the sublease

running with the land. The case is in point and supports respondents' contention.

It is argued that a formal demand of a renewal of the lease was necessary and that failing to make it defendant forfeited all right to a continuance of his term to 1919. It may be conceded that defendant might have exercised the right of Independence Oil Company to demand a renewal of the lease from its lessors after that corporation had parted with its interest in the lease; but by the terms of the sublease the owners of the Harper interest were not required to make any demand at all, and as that duty devolved upon plaintiff as successor to the Independence Oil Company, it would have been idle to require Standard Oil Company as lessee to demand the extended term from itself as owner of the fee.

Plaintiff insists that the original sublease from Independence Oil Company to Harper is not enforceable because not ratified by the stockholders of that company. At the time of the execution of that contract (July 18, 1902) a statute was in force which required such ratification. By this act it was provided as follows (Stats. 1897, p. 96): "It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, nor to purchase or obtain in any way (except by location) any additional mining ground, unless such act be ratified by the holders of at least two-thirds of the stock of such corporation then outstanding." This statute, and its predecessor (Stats. 1880, p. 131), as explained by Mr. Justice Sloss in the opinion of this court in *Royal Con. Min. Co. v. Royal Con. Mines*, 157 Cal. 752, [137 Am. St. Rep. 165, 110 Pac. 123], has been given a less rigid and strict interpretation in the later cases than in the earlier ones. In that case formal ratification of the transaction involved was not found to be necessary where one of the participating directors owned more than two-thirds of the stock. While we would doubtless hold that, in the absence of some proof of actual ratification the lease would be of no effect if the act were still in force, we are confronted with the fact that it was repealed in 1905 (Stats. 1905, p. 74). The Harper contract was treated as valid by Independence Oil Company up to March 26, 1907, and Standard Oil Company collected the full amount of royalties from Har-

per's successors from that time until near the close of the year 1909. Under clear principles of estoppel that corporation may not now assert the invalidity of a corporate act regular upon its face. The courts have almost uniformly sustained contracts which litigants who have profited thereby have later sought to avoid on the ground that such agreements were executed without proper authority. Such has been the ruling in the following cases: *Main v. Casserly*, 67 Cal. 128, [7 Pac. 426]; *Gribble v. Columbus Brewing Co.*, 100 Cal. 71, [34 Pac. 527]; *Lawrence v. Johnson*, 131 Cal. 176 [63 Pac. 176]; *Jones v. Evans*, 6 Cal. App. 90, [90 Pac. 532].

No other alleged errors require discussion.

The judgment and order from which plaintiff appeals are affirmed.

Henshaw, J., Lorigan, J., Shaw, J., Angellotti, J., and Sloss, J., concurred.

[S. F. No. 5877. Department Two.—January 6, 1913.]

HOSEA PRENTICE, Appellant, v. CHARLES ERSKINE,
Respondent.

VENDOR AND VENDEE—DEFECTIVE TITLE OF VENDOR—VENDEE CANNOT COMPLAIN OF DEFECT PRIOR TO TIME OF PERFORMANCE—GENERAL RULE.—The general rule obtaining in this state, that a defaulting vendee under an agreement of sale of land cannot complain because at a time prior to the maturity of the contract and the date fixed thereby for the delivery of a good and sufficient deed, the vendor was not in a position to convey full title to the land, is a harsh one and should not be unduly extended.

ID.—TITLE INCURABLY DEFECTIVE—EXISTENCE OF PUBLIC ROAD OVER LAND—DEFAULT OF VENDOR—RESCISSION BY VENDEE.—A vendor under an executory contract for the sale of land, the title to which at the time of the execution of the contract was incurably defective by any ordinary method of business negotiation, owing to the existence of a perpetual right of way for a public road over the land, is himself in default under the contract, and such default entitles the vendee to rescind the contract at any time, even though the time for final payment of the purchase price has not arrived, and to recover the part payments made under the contract.

ID.—BOTH PARTIES IN DEFAULT—DEMAND AND SURRENDER OF POSSESSION—RESCISSION.—Where both parties to such a contract were in default, their conduct, the vendor demanding and the vendee surrendering the possession of the premises, amounted to a rescission of the contract. By taking back the possession, the vendor waived his right to insist upon further payments under the contract, and notes of the vendee evidencing payments to be made in the future were properly canceled.

APPEAL from a judgment of the Superior Court of Fresno County and from an order refusing a new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

M. K. Harris, and L. B. Hayhurst, for Appellant.

W. F. Crist, F. W. Von Schrader, and L. L. Cory, for Respondent.

MELVIN, J.—The plaintiff appeals from a judgment in favor of defendant and from an order denying said plaintiff's motion for a new trial. The parties to the action entered into a written agreement whereby plaintiff covenanted to sell and defendant to buy certain real property for six thousand five hundred dollars. Of this the sum of five hundred dollars was paid on the execution of the contract, and subsequently a mortgage on the property of one thousand dollars was paid by defendant, and that amount was duly credited. Subsequent payments were to be made annually, and defendant also agreed to pay taxes and interest and to cultivate the land properly. Defendant entered into possession of the premises under the terms of the agreement immediately upon the execution thereof. According to the contract of sale, defendant's failure to comply with any of the terms thereof would relieve plaintiff from all obligations in law and equity to convey the property, and all payments made prior to such default were to be forfeited as liquidated damages. Defendant failed to pay the taxes and the first annual installment of one thousand dollars with interest, and, upon written demand of the vendor, surrendered the premises to him. Plaintiff then sued to quiet his title. By his

answer defendant asserted that the contract had been mutually abandoned and rescinded by the parties, and that plaintiff was himself in default under the agreement, because he was unable to convey clear title to the land in question owing to the existence of a perpetual right of way for a public road over said land, to an easement for an irrigating ditch across the property, and to the lien arising from a contract for the payment annually for water to be used on the premises. He asked for judgment for the one thousand five hundred dollars which he had paid to plaintiff on account of the contract of sale with interest thereon, and for four hundred dollars, the value of the necessary improvements on the place made by him during his occupancy thereof. The court, although finding that defendant had failed to pay taxes, interest, and installments according to the terms of the contract, found also that plaintiff was in default because, owing to the encumbrances on the land, he could not, either at the time of the making of the agreement or sale, or at the date of the commencement of this action, give a perfect title to the land. Judgment was given in favor of defendant for the one thousand five hundred dollars which he had paid, with interest thereon. It was found by the court that defendant had expended four hundred dollars for necessary improvements as alleged in his pleading, but that this amount was offset by the reasonable rental value of the land during his occupancy thereof. The judgment also provided for the cancellation of five promissory notes by defendant given in favor of plaintiff, each for one thousand dollars, payable in five equal annual sums respectively, and evidencing the deferred payments set forth and described in the contract of sale. Appellant contends that in the matter of the asserted rescission there is no essential difference between this case and *Oursler v. Thatcher*, 152 Cal. 740, [93 Pac. 1007]. In that case, as in this, there was a default on the part of the vendees in the performance of the conditions of the contract. There, as here, upon demand the vendees surrendered possession of the premises. It was held that these facts, together with the commencement of an action to quiet the title of the vendors, did not constitute a rescission of the contract by the mutual consent of the parties, and the vendees were properly denied judgment on their cross-complaint for the money paid as a

part of the purchase price prior to their default. Respondent denies the authority of that case because there was no question in it with reference to the sufficiency of the title of the vendors. He asserts that it has long been settled law in California that one may contract to sell real property and to deliver title at a future time who has no present interest in it; and *a fortiori* one who owns real property subject to certain encumbrances may enter into such an agreement. In this case, admittedly, Prentice did not own the land free from all encumbrances at the date of the agreement of sale, because that instrument by its very terms provided for the future payment of an existing mortgage, and Erskine obligated himself "to pay all water assessments on the water-right covering said premises." In California it is the general rule that a defaulting vendee under an agreement of sale cannot complain because at a time prior to the maturity of the contract and the date fixed thereby for the delivery of a good and sufficient deed, the vendor was not in a position to convey full title to the land. (*Joyce v. Shafer*, 97 Cal. 336, [32 Pac. 320]. See, also, *Backman v. Park*, 157 Cal. 607, [137 Am. St. Rep. 153, 108 Pac. 686], and authorities there cited.) It is a harsh rule and should not be unduly extended. If the only encumbrances upon the property were the easement for the irrigating ditch and the lien for the water-tax, we might be constrained to hold, under the authorities, that the case would fall within the rule discussed above, but as one of the defects in the vendor's title arose from the existence of a public servitude, we must conclude that plaintiff was himself in default, because that is the sort of cloud which in the nature of things he could not remove by any ordinary method of business negotiation. It would not be like a mortgage, for example, which might be extinguished by payment of the debt thereby secured, or like a lien for unpaid water rent which might be destroyed by settlement of the account. He could not either by adverse possession or by purchase take from the public the right to pass over the land on a dedicated highway. He was as completely helpless and hopeless of conveying a perfect title at any time as if the whole tract had been taken for use as a public park. The vendee might have rescinded the contract at any time even though the time for final payment had not arrived because

the vendor, in the nature of things, never could offer a perfect title to him. While this case differs from *Burks v. Davies*, 85 Cal. 110, [20 Am. St. Rep. 213, 24 Pac. 213], because in that case the vendee had the right to exercise his option at any time, and therefore the vendor was bound to be ready at all times during the life of the contract to convey an unclouded title, nevertheless the rule there announced is applicable, and the vendee was at all times entitled to rescind because there was no more chance to make the vendor's title complete and flawless at the maturity of the contract than at any other time. In *Koshland v. Spring*, 116 Cal. 700, [48 Pac. 62], it was said: "Since defendants were in express terms obligated to make good title as a condition of the sale, we do not concede that actual knowledge by the purchasers of dedication to public use of the extensive street surface exhibited on the map—the tract being mainly or largely agricultural and to be sold as acreage—could be deemed, while the contract remained executory, to imply a waiver of substantial fulfillment of the condition for title. (Sugden on Vendors, *p. 390; *Speakman v. Forepaugh*, 44 Pa. St. 363, 374; compare Devlin on Deeds, secs. 911, 913 and cases cited.) . . . So here, the reasonable construction of the contract is that defendants, the map before them, agree to make title to plaintiffs of unconveyed streets as well as lots; but it is found that there are at least grave doubts whether they have right to convey many of the streets; and the result is that they cannot enforce specific performance of the contract, and plaintiffs are entitled to return of their deposit." Vendee's right to rescission under such circumstances is upheld by such authorities as *Turner v. McDonald*, 76 Cal. 177, [9 Am. St. Rep. 189, 18 Pac. 262]; *Sheehy v. Miles*, 93 Cal. 288, [28 Pac. 1046]; *Wilcox v. Lattin*, 93 Cal. 588, [29 Pac. 226]; *Easton v. Montgomery*, 90 Cal. 307, [25 Am. St. Rep. 123, 27 Pac. 280]; *Boas v. Farrington*, 85 Cal. 535, [24 Pac. 787]; *Peckham v. Stewart*, 97 Cal. 147, [31 Pac. 928]. The conduct of the parties, both being in default, the one demanding and the other surrendering the possession of the premises, amounted to a rescission of the contract.

By taking back the possession of the property, plaintiff, of course, waived his right to insist upon further payments under the agreement of sale. Consequently the notes evi-

dencing payments to be made in the future execution of that agreement were properly shorn by the court of their apparent efficacy.

No other specifications of alleged error require comment.
The judgment and order are affirmed.

Lorigan, J., and Henshaw, J., concurred.

[Crim. No. 1720. In Bank.—January 8, 1913.]

THE PEOPLE, Respondent v. THOMAS J. SMITH,
Appellant.

CRIMINAL LAW—MURDER—EVIDENCE OF DYING DECLARATIONS—BELIEF OF IMPENDING DEATH.—In a prosecution for murder, it is the abandonment of hope and the expectation of certain and imminent death by the person injured, and the belief of the law that at such an awe-inspiring time, a man about to be called to account before his Maker, will tell the truth, that alone justify the reception in evidence of his dying declarations against the defendant.

ID.—REAFFIRMANCE UNDER BELIEF OF DEATH OF STATEMENT PREVIOUSLY MADE.—A statement of the deceased, made at a time when he was not under the belief of immediate and impending death, may afterward, while under the fear of death, be reaffirmed by him under circumstances entitling it to admission. Greater care, however, should be exercised by the trial court, and a more satisfactory showing of the declarant's condition of mind made manifest, than where the statement itself is uttered in the first instance under the circumstances required by the law.

ID.—EVIDENCE—REAFFIRMANCE OF STATEMENT NOT UNDER BELIEF OF DEATH.—In the present case, it is held that the evidence is conclusive that the statement of the deceased was not made originally under the circumstances contemplated by the law, and that the showing is wholly insufficient to establish that it was reaffirmed afterward under such circumstances. The fact that the deceased was dying, although significant, is not controlling. The fact of controlling significance is his belief that the hand of death was upon him.

ID.—INSTRUCTION—SELF-DEFENSE—MISTAKE AS TO EXTENT OF APPREHENDED DANGER—"JUDICIOUS MAN."—In a prosecution for murder, in which self-defense was pleaded in justification, an instruction that if the defendant "acted from reasonable and honest convic-

tions, he cannot be held criminally responsible for a mistake in the actual extent of the danger, when other judicious men would have been alike mistaken," is rendered objectionable from the use of the word "judicious," instead of the accepted word "reasonable."

Id.—"ORDINARILY COURAGEOUS MAN."—The use of the phrase "ordinarily courageous man," instead of the phrase "ordinarily reasonable and prudent man," in an instruction that "if one person kills another through mere cowardice or under circumstances which are not, in the opinion of the jury, sufficient to induce a reasonable and well founded belief of danger to life or of great bodily harm in the mind of an ordinarily courageous man, the law will not justify the killing on the ground of self-defense," is objectionable.

Id.—THREATS AGAINST LIFE—ATTEMPT COUPLED WITH ABILITY TO TAKE LIFE.—An instruction "nor does the fact that one person had made threats against the life of another, though taken in connection with the fact that the threatener was of a violent and dangerous character, justify or excuse an immediate resort to deadly weapons, resulting in killing him, in the absence of some demonstration, real or apparent, of an attempt, coupled with ability, to take life," is objectionable in stating that the demonstration or attempt shall be "coupled with ability to take life," before the defendant may resort to a deadly weapon in his self-defense, instead of stating that the demonstration or attempt should be coupled with a real or apparent ability to take life.

Id.—CIRCUMSTANTIAL EVIDENCE.—Where there was only direct evidence of the homicide, and the fact of its commission was admitted, there was no occasion to instruct the jury upon the character and value of circumstantial evidence.

Id.—REASONABLE DOUBT—ERRONEOUS INSTRUCTION.—An instruction that "a doubt to justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case. If, after considering all the evidence you can say that you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt," is erroneous.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order refusing a new trial.
J. W. Hughes, Judge.

The facts are stated in the opinion of the court.

William Tomskey, and T. J. Crowley, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, for Respondent.

HENSHAW, J.—The defendant, charged with the murder of Charles Wolters, was convicted of murder in the second degree. From the judgment and from the order denying his motion for new trial he prosecuted his appeal to the court of appeals, where his appeal was denied. A hearing was ordered before this court for the further consideration of certain of the legal questions involved.

The *theory* of the prosecution, as outlined in the opening statement of the prosecuting attorney and in the instructions given by the court at the request of the prosecution, was that defendant Smith nursed a feeling of bitter hostility against Wolters; that about ten o'clock on Sunday, the fourth day of September, 1910, in the city of Sacramento, Smith purchased a pistol, lay in wait for Wolters, met him in front of the Western hotel, and then "without one word spoken by either side, by either the deceased or the defendant," drew his pistol and assassinated Wolters, or, at the time of firing "exclaiming at the same time 'you will not beat me out of another job, you son of a bitch,' " (both quotations are from the opening statement of the district attorney) shot Wolters to death.

By the defense it was contended that as early as half past five o'clock of that Sunday morning the deceased, in a saloon, had twice made an unprovoked savage assault upon the defendant, who was crippled in one hand, and that the defendant escaped serious bodily injury only by the intervention of bystanders; that the deceased made threats, both communicated and uncommunicated, to beat, injure, and kill defendant; that, still upon the morning of Sunday, the defendant made appeal to the police department of Sacramento for a warrant for the deceased's arrest, and was told to come back the next day, and, failing thus of police protection, purchased a pistol with which to defend himself; that defendant was employed as a solicitor or "runner" for the Western hotel; that he repeatedly avoided the deceased during the day, but that deceased hung about the hotel, threatening injury to the defendant and apparently seeking a conflict with him; that, leaving the hotel early in the evening in the pursuit of his regular business he was approached by the deceased, who had been standing on the sidewalk in front of the hotel, and who, with vile language of abuse, began to threaten him as he approached, and that, in fear of death or great bodily injury,

he drew his pistol and fired. The killing was thus admitted and the defense was self-defense.

The *evidence* of the prosecution bearing upon the homicide consisted of the testimony of the witness Simmons, who conducted a cigar store next to the Western hotel. He had seen deceased in front of the Western hotel about half an hour before the shooting leaning against a post upon the sidewalk. Witness was reading a newspaper, when he heard a pistol shot. Looking up, at the pistol shot, he saw Wolters falling off the sidewalk and into the gutter. "Smith was standing kind of sideways and after the first shot, why, he turned around and fired two more shots." When his eye first caught the scene, Smith was standing near to the wall of the building, between him and Wolters and about eight feet from the latter. He saw nothing of the affray before this moment of time, and heard no words spoken by either of the men.

Another witness, Perry, testified that he had a slight acquaintance with both the defendant and deceased; that passing the Western hotel he saw the defendant standing up against the wall, spoke to him and received no response, but as he passed the defendant "stepped right behind me and said to somebody—I didn't notice who it was—he says, 'you damned son of a bitch, you will not beat me out of another job,' and just then he fired." By the time the witness had turned, three shots had been fired, and the deceased was falling or had fallen into the gutter.

All the other evidence of the prosecution is contained in the dying declaration of Wolters, which was admitted in evidence over the objection of the defense. The matter of this dying declaration will require more detailed consideration. For the present it is sufficient to say that Wolters's statement is that the defendant shot him to death, the shooting being sudden, unexpected, and unprovoked.

For the defense, it was shown that both men were solicitors or "runners" for the same hotel, that the deceased, and not the defendant, had by the proprietor upon Saturday the 3rd of September been discharged. It was further shown that Smith had not been discharged from that or any other employment, and was at the time of the homicide still in the employ of the hotel. Also, it was shown by a mass of testimony that the reputation of Smith for peace and quiet was good and that

of the deceased very bad. Still further it was shown by testimony presumably disinterested, and certainly unimpeached, that upon the morning of the homicide the deceased, ugly and inflamed with liquor, had, between half-past five and six o'clock, demanded that Smith pay him \$1.75 which he insisted Smith owed him; that Smith replied that he did not owe him the money, but would pay him for the sake of peace, and gave Wolters \$1.75; notwithstanding this, that Wolters assaulted Smith and struck him, Smith making no resistance. The barkeeper who testified to these things as well as did Smith, declares that he pulled Wolters from Smith and protested against his assaulting an inoffensive man; that nevertheless, when the barkeeper had returned behind the bar, Wolters again assaulted Smith and again the barkeeper, with assistance stopped the assault and Smith left the saloon, Wolters saying as Smith left "If I had a gun I would kill that man." Evidence of other assaults and attempted assaults by Wolters upon Smith during the day are in evidence. It is in evidence also that after Smith had purchased his weapon he left at least two places upon the entry therein of Wolters, one the office of the hotel, another the adjoining saloon. Threats of violence against Smith by Wolters are also shown by other witnesses. Thus, witness Hyde testifies that during that day Wolters said, referring to Smith, "I will get him. I will make a good dog out of him yet." Another witness, Hoffman, testifies that upon the same day Wolters said, referring to Smith, that "He would lick him every time he met him in Sacramento; and if he left Sacramento and went to San Francisco he would go to San Francisco and lick him there; and if he went to New York he would follow him to New York and lick him there." And finally, there is the evidence of the witness Bascherini testifying for the defense, the one witness who, aside from the defendant himself, was an eye witness to the occurrences, immediately preceding the shooting. He testified that he was a boot black; that his boot black stand was in the immediate neighborhood of the place of the shooting; that he was there at work upon the evening of and at the time of the shooting; that he saw Smith standing by the wall; that Wolters was close to him, about two feet or two feet and a half away; that Wolter's attitude and appearance were those of an angry man; that he was shaking his head and his

lips were moving as though in speech, though he could not distinguish the words; that at this moment he turned to his work of polishing shoes and immediately thereafter heard the first shot.

Reverting to the evidence of the prosecution, it is manifest that the only testimony (aside from the dying declaration) tending to show the deliberate and unprovoked murder for which the prosecution contended, was given by the witness Perry, and that Perry's account needed material support for the reason that, while his testimony would abundantly justify the inference of a willful and cold-blooded murder, the testimony itself is lame and halting by reason of the language which he puts in the defendant's mouth. For, as has been stated, it would be strange for the defendant to have said to the deceased "You will not beat me out of another job" when the facts were that the defendant had not been beaten out of any job, and was still holding his position, while the deceased had been discharged and thus "beaten out of his job" but the day before.

Therefore it is that the evidence contained in the dying statement of the deceased becomes most material in the establishment of the crime charged and in the overthrowing of the self-defense asserted by the defendant in justification of his act. For, without the evidence of the dying declaration it cannot be said that the jury would have accepted the somewhat curious account given by the witness Perry.

The facts concerning and attending the dying statement are that a bullet from defendant's pistol had pierced the abdominal cavity from the front, passed through the body and lodging in the spine. The wound was necessarily fatal, and from it Wolters died about twelve o'clock the following day. He was taken to a hospital upon the evening of the shooting. The next morning the abdomen was much extended, peritonitis had set in and by the testimony of one of the physicians Wolters was irrational from the fever of that inflammation. However, by the testimony of the district attorney, who received the dying statement, and by the testimony of another physician, Wolters was rational and appreciated what was said to him. The district attorney called upon Wolters in the hospital about eleven o'clock on Monday morning. There came to the bedside of the dying man the district attorney,

his deputy, Mr. Brown, and Mr. Doan, the stenographic reporter. By the stenographic report the preliminary conversation is as follows:

"Charley, I am the district attorney and I want to take a little statement from you, if you feel like you can give it to us. Now Charley, are you pretty badly hurt?

"A. Well, by God, I don't know.

"Q. Well, do you think you are going to die?

"A. I hope not.

"Q. Well, how do you feel about it? Did the doctor tell you you didn't have much chance?

"A. No.

"Q. You know you are shot pretty bad, don't you?

"A. I presume.

"Q. The doctor said, Charley, that the chances are that you are going to die. Now, how do you feel about it?

"A. If he feels that way, I don't know.

"Q. You think you are going to die?

"A. Well, I can't say.

"Q. You feel pretty weak, do you?

"A. No.

Immediately following this the district attorney proceeded by questions to elicit from Wolters his version of the fatal affray. Certainly no word up to this time gives evidence that Wolters was answering these questions in the presence of death, in the prospect of "almost immediate dissolution," without expectation or hope of recovery. (*People v. Hogdon*, 55 Cal. 72, [36 Am. Rep. 30]; 1 Greenleaf on Evidence, sec. 158.) Moreover, in the course of the inquiries put to him by the district attorney, Wolters having stated that just before the shooting he was talking to a conductor on the sidewalk, is asked: "Is that conductor going to work today or tomorrow? A. I can get his name if I get better. So long as there is life there is hope."

At the conclusion of the district attorney's inquiry, Dr. White was called in from the operating room and had a conversation with Wolters, lasting about a minute and a half, in which he stated to Wolters that he was going to die. The doctor was asked what he said to the wounded man and answered "I told him he was in a dying condition and my opinion was that he was going to die." Asked what the

patient replied, he answered, "I don't know. In fact I have forgotten." Mr. Wachhorst, the district attorney, testifies: "Do you say that the wounded man expressed himself any more strongly as to his condition after the doctor had spoken to him than appears in this report or transcript by the reporter?"

"A. Well, all I can say in response to that question is to repeat what he did say in response to the statement made by the doctor.

"Q. I understand you then, Mr. Wachhorst, to say that the wounded man said 'all right, doctor, I understand, go ahead.'

"A. Something to that effect, substantially so."

The testimony of Mr. Doan, the stenographic reporter, is found in the transcript of his notes. By them, what took place is the following:

"Now, Charley, you know I am the district attorney. A. Yes. Q. This is the shorthand reporter? A. Yes. Q. Now, of course, if you are going to die, Charley, we want to get a statement from you, you see, before you die. Now, the doctor will talk to you.

"(Dr. White talks to Wolters.) Mr. Wachhorst. Now Charley we won't bother you much more, but this is very important. Now, the doctor has advised you that you are going to die. Do you realize it now, Charley? A. Yes. Q. And you feel that you are pretty bad off. A. Yes. Q. Now, all that statement that you have made to us has been under the belief that you are going to die. A. Yes. Q. You have told us the whole story, have you? A. Yes, I can't tell any more. Q. What you have told us is the truth, is it? A. That is the truth. Q. The whole truth and nothing but the truth? A. Yes. Q. Now, Charley, before you die do you want to say anything more? A. No."

The conditions under which the declarations of a deceased may be received in evidence as a dying declaration, the anomaly which permits the reception of such evidence at all, have both received such elaborate exposition that it would be a waste of time to expatiate upon the subject. It is the abandonment of hope, the expectation of certain and imminent death, and the belief of the law that, at such an awe-inspiring time, a man about to be called to account before his Maker, will tell the truth, that alone have justified the reception of

such statements against a defendant who is thus deprived of his most valuable rights of confrontation of witnesses and cross-examination. (*People v. Sanchez*, 24 Cal. 17.) The extracts which we have quoted give evidence of an assiduous effort upon the part of the district attorney, by leading and suggestive questions, to evoke a declaration from the lips of the wounded man measuring up to the requirements of the law. But they show no more than this. That the man was injured unto death, that he was indeed in a moribund condition at the time the so-called statement was taken, are unquestioned facts; but that he appreciated this and made his declarations with a sense of the gravity of the situation and of the consequences of his words, we cannot for one moment believe. As has been said, and as will be further shown, the whole statement was made after the sick man's declaration that he did not know whether he was badly hurt or not, that he hoped he was not, that he didn't know whether he was going to die or not, and that he did not feel "pretty weak." In the course of his answers, as has been pointed out, he declares that "while there is life there is hope." Yet to the district attorney, at the conclusion of the interrogatories, he answered "Yes" to the most leading question: "Now, all that statement that you have made to us has been under the belief that you are going to die." Still further, the internal evidence of the asserted dying declaration may itself help establish the state of mind of the declarant and in this case does so. One cannot read the statement here offered, made up in all essential particulars, as it is, of leading questions, designed to draw particular answers from the witness, without becoming convinced that the sick man was either semi-irrational, as one of the physicians testified, or that from extreme illness or extreme recklessness, he was willing to answer any question as he thought the district attorney desired it to be answered. It may be well to make some quotations: "Q. How many shots did he fire at you? A. Two. Q. Two shots? A. Yes. Q. Well, he fired three shots, Charley? A. Well, that is all I know. Q. All you know, he fired two shots? A. Yes. Q. Struck you once in the stomach? A. Yes. Q. And once on the finger? A. Yes. Q. Now, Sunday you met him in the saloon there—in Cody's saloon—didn't you? A. Yes. Q. Did you have any trouble with him there? A. No. Q.

Did you strike him there? A. No. Q. Sure, Charley? A. I am sure. I will tell you, after he called me all the Dutch sons of bitches and all that, I think I gave him one punch, but that wasn't when the shooting took place. That was before. Q. Yes, in the morning? A. Yes. Q. Now, how many times did you strike him Sunday? A. Once. Q. That was in Cody's saloon? A. Yes, I guess it must have been. Q. You only struck him once, Charley? A. Yes. I am no fighting man. Q. That is the only trouble you had with him? A. That is all, because I refused to give him money. Q. Now, did he pay you the dollar and seventy-five cents in Cody's saloon? A. Yes, he did. Q. You hit him first, didn't you? A. He looked at me, and he said to me 'Here, you son of a bitch' he says, 'that is not the way I let you have the money that time.' Q. Well, when you struck him in Cody's saloon, did he strike you? A. Of course, he struck me. Q. Where did he strike you? A. In the face. Q. Can you move your face over this way? Is that where he struck you, down here (indicating)? A. Yes. Q. There is a mark here on the right temple. Is that where he struck you? A. Yes. Q. He struck you there, did he, Charley? A. Yes. Q. What time in the afternoon was the shooting, about, as near as you can remember? A. Oh, it was about half-past five—quarter past five, probably a quarter to six. Q. It was later than that, Charley; it was about seven o'clock. A. Well, it may have been. It was getting dusk. Mr. Brown: It was getting dark, wasn't it? A. Oh, boys, I want a drink of water. Mr. Wachhorst: Well, we will see if we can get you a drink, Charley. (Wolters was given a drink of water.) Mr. Brown: Charley, did Smith say anything to you before he commenced to shoot? A. Not a word. Q. Did you see him pull a gun or pistol or anything? A. No. Mr. Wachhorst: Q. Charley, did he call you any name when he shot? A. He says 'Take that, you ——.' Q. Then he shot the second time? A. Yes. Q. Did you walk toward him when he shot? A. I don't think I did. Q. You don't think you walked toward him at the second shot, do you? A. No. Mr. Brown: After you heard the first shot, did he come toward you then? Did you see him coming toward you? A. Yes. Q. Was he walking quickly or slowly? A. Well, he was trying to get

me more, don't you see? Q. Where did he first hit you, if you remember? A. In the back. Mr. Wachhorst: Did you have your back toward him when he shot? A. Yes. Q. Did you turn toward him then? A. Why, of course, naturally. Q. Did you know that he was standing there when you walked up? A. No, no. Q. You didn't know he was there at all? A. No. Q. You had no intention of doing him any harm, had you? A. No."

In the one breath, the deceased states that he saw the defendant talking to a woman and the defendant saw him coming down the street and walked toward him. In the next he says that he did not know that Smith was standing there when he walked toward him. In one sentence, in answer to the question "Did Smith say anything to you before he commenced to shoot," he replies "Not a word." Here Mr. Wachhorst takes the interrogations away from his assistant, Mr. Brown, with the question, "Charley, did he call you any name when he shot?" And the witness answered, "He says, take that you ——." Again he says that he had his back toward Smith at the time Smith first shot him, that the first shot struck him in the back. He had previously testified that Smith approached him from in front, and the physical fact is that he was not shot in the back, but that the fatal wound, unquestionably the first shot fired, struck him from the front in the abdomen.

To sum up on this matter: It is not because the declarations of the deceased were not in the first instance made under the belief of immediate and impending death that they are inadmissible. It is recognized that a statement not so made may under fear of death be reaffirmed by the declarant under circumstances entitling it to admission. (*People v. Crews*, 102 Cal. 174, [36 Pac. 367].) But certainly considering the character of such evidence and the tremendous consequences following to a defendant from its admission, considering further that if a declaration is taken from the injured person when he is not in fear of death, if subsequently he has abandoned hope and feels that death is imminent, he is frequently, if not usually, in a debilitated state of mind and body, it is not too much to say that a greater care should be exercised by the trial court and a more satisfactory showing of the patient's condition of mind made manifest in such a case,

than where the statement itself is uttered in the first instance under the circumstances required by the law. What, then, we do mean to say is that the evidence is conclusive that the statement was not made originally under the circumstances contemplated by the law, and that the showing is wholly insufficient to establish that it was reaffirmed afterward under such circumstances. The fact that the man was dying has, of course, its significance, but it is not the fact of controlling significance. The fact of controlling significance is his *belief* that the hand of death was upon him. (*People v. Cord*, 157 Cal. 562, [108 Pac. 511].)

The materiality of the evidence thus improperly introduced has been sufficiently commented on. In view of the new trial which must be ordered, certain instructions demand attention. In contemplation of the character of the evidence and the plea of self-defense in justification, the instructions given at the request of the prosecution could with advantage be made much briefer. As a part of an instruction the court charged that if the defendant "acted from reasonable and honest convictions, he cannot be held criminally responsible for a mistake in the actual extent of the danger, when other judicious men would have been alike mistaken." "Judicious" is here used, in place of the well accepted word "reasonable." Fundamentally, a defendant's conduct, it has been over and over said, is measured by the standard of what the ordinarily reasonable and prudent man would have done under the same circumstances. The introduction or injection of new words is without benefit and serves only to afford a ground of more or less reasonable complaint. The same may be said of the following instruction: "If one person kills another through mere cowardice or under circumstances which are not, in the opinion of the jury, sufficient to induce a reasonable and well founded belief of danger to life or of great bodily harm in the mind of an ordinarily courageous man, the law will not justify the killing on the ground of self-defense." Here, again, the court shifts the standard from that of the ordinarily reasonable and prudent man to that of the "ordinarily courageous man." It might be that the logician could establish that the ordinarily reasonable and prudent man is the ordinarily courageous man. It might be that the logician could not do this. But, again we say that nothing is gained

by the introduction before the jury of these new measures and standards.

The following instruction is unhappily worded: "Nor does the fact that one person had made threats against the life of another, though taken in connection with the fact that the threatener was of a violent and dangerous character, justify or excuse an immediate resort to deadly weapons, resulting in killing him, in the absence of some demonstration, real or apparent, of an attempt, coupled with ability, to take life." Elsewhere the jury was properly instructed as to a defendant's right to rely upon appearances, if those appearances were sufficient to excite the fears of a reasonable man that he was then in immediate danger of death or great bodily injury at the hands of the deceased. But here the jury is told that the "demonstration of an attempt," (meaning probably demonstration or attempt) shall be "coupled with ability to take life," before the defendant may resort to a deadly weapon in his self-defense. This, of course, is not the law. It may be that the jury was not misled by this instruction. It is unfortunate, however, that inconsistent instructions should be given. What the court probably meant, and certainly should have said, is that the demonstration or attempt should be coupled with a real or apparent ability to take life. The court instructed the jury upon the distinction between direct and circumstantial evidence. There was not only direct evidence of the homicide in this case, but it was admitted. There was, therefore, no occasion to instruct upon the character and value of circumstantial evidence. The court further instructed the jury as follows: "A doubt to justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case. If, after considering all the evidence you can say that you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt." A like instruction was criticised and condemned in *People v. Schoedde*, 126 Cal. 376, [58 Pac. 859]. It certainly does not better the long approved instruction of Chief Justice Shaw.

None of the asserted errors in the rulings of the court admitting and rejecting evidence require detailed consideration. The rulings themselves were either correct or were without

prejudice to the defendant. But for the error of the court in admitting against the defendant the purported dying declaration of Wolters, the judgment and order are reversed and the cause remanded.

Melvin, J., Angellotti, J., Sloss, J., and Shaw, J. concurred.

[S. F. No. 5833. In Bank.—January 9, 1913.]

HENRY B. SCHULTE, Appellant, v. BOULEVARD GARDENS LAND COMPANY (a Corporation), Respondent.

CORPORATION—CAPITAL STOCK DEFINED—ASSETS—PROHIBITION AGAINST PAYING TO STOCKHOLDERS.—The phrase “capital stock,” as used in section 309 of the Civil Code, prohibiting directors of corporations from dividing, withdrawing, or paying to the stockholders, or any of them, any part of the capital stock, or from reducing or increasing the capital stock, except as therein provided, means the actual capital, the assets, with which the corporation carries on its corporate business, and not the shares of which the nominal capital is composed.

Id.—STOCKHOLDERS HAVE NO POWER TO DO FORBIDDEN ACTS.—Although the prohibition of that section runs, in terms, only against the directors, the effect of the section is to deprive the stockholders as well of power to do the forbidden acts.

Id.—CORPORATION CANNOT PURCHASE ITS OWN STOCK.—In view of that section, a corporation in this state, is not authorized to employ its assets for the purchase of shares of its own stock, since the result would be to illegally withdraw and pay to a stockholder a part of the capital stock.

Id.—AGREEMENT OF CORPORATION TO REPURCHASE STOCK—CONDITION OF CONTRACT UNDER WHICH STOCK WAS ISSUED.—An agreement by a corporation, constituting a condition and a part of the consideration of an entire contract under which its stock was originally issued, obligating it, at the election of the stockholder, to repurchase the stock at a stated price, is not within the inhibition of the section. Such an agreement is enforceable against the corporation, subject to the qualification that the rights of creditors are not injuriously affected, and that it would not result in a fraudulent invasion of the rights of other stockholders.

ID.—AMOUNT PAYABLE ON RETURN OF STOCK IMMATERIAL.—It is immaterial to the validity of such an agreement whether the amount to be paid by the corporation on the return of the stock was equal to, or more or less than, the original price for which it was issued.

APPEAL from a judgment of the Superior Court of Alameda County. John Ellsworth, Judge.

The facts are stated in the opinion of the court.

J. A. Elston, and George Clark, for Appellant.

Keyes & Martin, and Leon E. Martin, for Respondent.

SLOSS, J.—The plaintiff appeals from a judgment in favor of defendant, entered upon an order sustaining, without leave to amend, a demurrer to the plaintiff's first amended complaint.

The complaint contains eighteen counts, but, by stipulation of the parties, only the first, the second, the third, the tenth, the eleventh, and the twelfth counts are included in the transcript, the omitted counts being, so far as concerns the legal questions here involved, precisely similar to one or another of those before us.

The first count, with amendments subsequently made thereto, alleges that on April 3, 1908, the defendant, a corporation organized under the laws of California, executed and delivered to plaintiff a written agreement, reading as follows:

“Berkeley, Cal., April 2nd, 1908.

“This agreement to accompany Boulevard Gardens Certificate of Stock No. 165, issued to Henry B. Schulte under date of April 3rd, 1908.

“First. We, the undersigned, individually and severally, promise and agree that should there be at any time any assessment levied against above described certificate of stock, we will pay the same.

“Second. We further promise and agree on behalf of the Boulevard Gardens Land Company, that should the purchaser of said stock certificate at any time prior to the payment of dividends equaling the face value of said stock wish to sell the same, we will repurchase it at par value providing that

we receive ninety (90) days' notice of such desire to sell; and should the stock above described be so repurchased by us under this agreement, we will pay to the holder thereof a sum equal to eight (8 pct.) per cent net upon the face value thereof from the date of its purchase to the date of its sale to us.

“(Signed) GEORGE SCHMIDT, President.

“G. W. SKILLING, Vice-Pres.

“EDWARD BONSALL, Director.

“For the Boulevard Gardens Land Co.

“(Corporate Seal.)”

The certificate referred to in the agreement was a certificate, issued to plaintiff as owner, for twenty shares of the capital stock of the defendant corporation, of the par value of one hundred dollars per share. It was issued and the agreement executed for the single and entire consideration of two thousand dollars, paid by plaintiff to defendant, and the certificate, with the written agreement, formed parts of a single transaction and an entire contract. No dividends were ever declared or paid. On December 3, 1909, plaintiff gave to defendant notice that he desired defendant, at or before the expiration of ninety days, to repurchase the shares as agreed, and offered to indorse and return the certificate. After the lapse of ninety days, to wit, on March 8, 1910, plaintiff repeated his demand and tender, and is still able and willing to comply with the terms of his tender. The defendant refused to pay, and has not paid, any part of the sum of two thousand dollars agreed to be paid to plaintiff.

It is further alleged that, at the time the contract was made and ever since, the defendant owned and owns surplus profits exceeding, by over fifty thousand dollars, the sum of the corporate debts, together with the value of everything received by the defendant in exchange for its issued shares of stock. The defendant could comply with its contract without injury to any creditor or stockholder.

The second count relies upon the same contract. It omits the allegation of tender, but seeks to show that a tender would have been useless. Otherwise, the count does not differ from the first. The third count contains substantially the same averments of fact as the first, but is framed with a view

to demanding a return of the money paid, on the theory that the contract is illegal.

The tenth count is based on a contract between the defendant and one D. N. Mitchell, in the following form:

“Berkeley, Cal., Sept. 9th, 1907.

“The Boulevard Gardens Land Company, incorporated, hereby agrees to pay to D. N. Mitchell of Calistoga, Calif., at any time after one year (and not exceeding eighteen months) from the date hereof the sum of Twelve Hundred and Fifty (\$1250.00) Dollars, together with interest at 6 per cent from this date on \$1000.00 for the return and surrender of Ten (10) shares of Boulevard Gardens Stock to-day issued to him and recorded on the books of the company.

“The Boulevard Gardens Land Company, Inc.

“By GEORGE SCHMIDT, Pres.

“By G. W. SKILLING, Vice-Pres.”

It will be observed that while Schulte's contract calls for the return, only, of the purchase price of the shares, with interest, the Mitchell agreement assumes to bind the defendant to pay a bonus of twenty-five dollars per share, if it be assumed—there is no direct allegation on this point—that the shares were bought from the company at par. The plaintiff claims as assignee of Mitchell's rights. In other respects, the averments of the tenth count are like those of the first. With like exceptions, the eleventh count corresponds to the second, and the twelfth to the third.

The demurrer went to each count. It was based on the ground of want of facts, and contained, as well, various specifications of uncertainty, ambiguity, and unintelligibility. We think none of the special assignments would have justified a sustaining of the demurrer without leave to amend, and we shall therefore confine our discussion, as counsel have done, to the consideration of the general ground of want of facts to constitute a cause of action.

The position of the respondent is that the contracts for the retaking by the corporation of its own shares are illegal and void, as in violation of the provisions of section 309 of the Civil Code, prohibiting directors of corporations from dividing, withdrawing or paying to the stockholders, or any of them, any part of the capital stock, or from reducing or increasing the capital stock, except as provided in the section.

The phrase "capital stock," as used in this section, and in the section of the Practice Act from which the code provision was drawn, has been construed in various decisions of this court. Its meaning has been definitely settled to be, not the shares of which the nominal capital is composed, but the actual capital, i. e., assets, with which the corporation carries on its corporate business. (*Martin v. Zellerbach*, 38 Cal. 309, [99 Am. Dec. 365]; *San Francisco & N. P. R. R. Co. v. Bee*, 48 Cal. 398; *Kohl v. Lilienthal*, 81 Cal. 385, [6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689]; *Tapscott v. Mex. Col. etc. Co.*, 153 Cal. 667, [96 Pac. 271]; *Burne v. Lee*, 156 Cal. 222, [104 Pac. 438].) Although the prohibition runs, in terms, only against the directors, the effect of the section is to deprive the stockholders as well of power to do the forbidden acts. (*Kohl v. Lilienthal*, 81 Cal. 385, [6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689]; *Burne v. Lee*, 156 Cal. 222, [104 Pac. 438].)

In other jurisdictions, the authorities show a sharp conflict over the question whether, in the absence of any statutory or charter restrictions, a corporation may employ its assets for the purchase of shares of its own stock. (Cook on Corporations, 6th ed., sec. 311.) But in view of the code provisions to which we have referred, it cannot be doubted that, in this state, a corporation is not authorized to make such purchase, since the result would be to illegally withdraw, and pay to a stockholder a part of the "capital stock." (*Bank of San Luis Obispo v. Wickersham*, 99 Cal. 655, 661, [34 Pac. 444].) The want of power to buy its own stock does not prohibit a corporation from taking the stock in satisfaction of a loan, or when otherwise necessary to save itself from loss (*Ralston v. Bank of California*, 112 Cal. 208, 213, [44 Pac. 476]), but the general rule is, as above stated, that the purchase is unauthorized. Thus, this court has condemned, as in violation of section 309, a by-law assuming to give to any stockholder, the right, upon sixty days' notice, to withdraw from the corporation, and to receive, upon surrender of his stock, the amount paid therefor. (*Vercoutere v. Golden State L. Co.*, 116 Cal. 410, [48 Pac. 375].)

In the case at bar, however, we have something more than a mere attempt by a stockholder to sell, and by the corporation to buy, shares of stock. The plaintiff is seeking to enforce a part of an entire contract under which the stock was

originally issued to him. The right to return the stock and to receive the sum agreed to be paid upon such return was a material and indivisible part of the consideration upon which the plaintiff agreed to become a stockholder. As between the parties, it would be manifestly unjust to permit the corporation to retain the money paid by plaintiff, and at the same time to repudiate the promise which it gave in exchange for the money. The obligation to pay, upon a return of the shares, the sum agreed to be paid, is not to be viewed as a new undertaking, arising after the plaintiff has assumed the relation of stockholder. It came into being coincidentally with the contract by which plaintiff became a stockholder. The sale to plaintiff was conditional. He never became a stockholder except subject to the qualification that he might return his shares upon the stipulated terms. In *Ophir Cons. Mines Co. v. Brynteson*, 143 Fed. 829, [74 C. C. A. 625] the circuit court of appeals for the seventh circuit, in upholding the right of recovery under a contract similar to those in the case at bar, used this language: "It is contended that the contract violates section 485, Mills' Ann. St. Colo., which prohibits the use by corporations of any of their funds 'for the purchase of stock in their own company or corporation, except such as may be forfeited for the nonpayment of assessments thereon.' This agreement is in no sense within the meaning or object of the provision referred to. The stock was held in the treasury of the company to raise funds for improvements, upon such terms of sale as were adopted by the president. The right to so hold and own the stock remains in the corporation until an absolute sale is made. No such sale arose under the agreement in suit. It was of the well recognized class, known as a contract of 'sale or return,' as defined in *Sturm v. Boker*, 150 U. S. 312, 328, [37 L. Ed. 1093, 14 Sup. Ct. Rep. 99], where the title passes for the time being, but subject to the option of the purchaser to rescind and return the property within the time stipulated. With the exercise of the option the contract of sale terminates and the right and title of the corporation is restored to its original *status*. No sale has been accomplished, and no purchase or repurchase arises upon the part of the corporation through the return of its unsold stock."

The great weight of authority is in accord with this view. Contracts of the kind under discussion have generally been sustained, and this, too, in jurisdictions in which corporations are not permitted to purchase their own stock. (*Browne v. St. Paul Plow Works*, 62 Minn. 90, [64 N. W. 66]; *Vent v. Duluth C. & S. Co.*, 64 Minn. 307, [67 N. W. 70]; *Porter v. Plymouth G. M. Co.*, 29 Mont. 347, [101 Am. St. Rep. 569, 74 Pac. 938]; *Sweeney v. United Underwriters Co.* (S. D.), 137 N. W. 379; *Jones v. Johnson*, 86 Ky. 530, [6 S. W. 582]; see, also, 10 Cyc. 416; 2 Cl. & M. Pr. Corp., sec. 475; 1 Cook on Corporation, 6th ed., secs. 83, 170.) A similar ruling has been made in this state in *Dickinson v. Zubiata Mining Co.*, 11 Cal. App. 656, [106 Pac. 123]. The case of *Vercoutere v. Golden State L. Co.*, 116 Cal. 410, [48 Pac. 375], is strongly relied on by respondent as establishing the contrary doctrine in California. But the case is readily distinguishable from the one at bar. There the plaintiff relied solely upon a by-law which assumed to authorize every subscriber and stockholder to withdraw from the corporation and, upon returning his stock, receive what had been paid in. Obviously this, if upheld, would have made possible a complete destruction and dissolution of the corporation without compliance with the statutory requirements. As a by-law the provision was clearly bad. But a very different case is presented where an individual sets up a contract whereby the corporation selling him stock agrees, as part of the consideration, to give him the option of returning the stock and receiving a payment therefor.

All that has been said is subject to the qualification that the rights of creditors are not to be affected by any arrangement between the purchaser of stock and the corporation. Undoubtedly a creditor of the corporation would be entitled to hold the conditional purchaser as a stockholder and to insist that the amount of his subscription be made applicable to the satisfaction of the corporate debts. In most of the cases cited by appellant, the courts were dealing with states of fact in which the rights of creditors were involved. But no such question arises here, the complaint alleging that the assets of the corporation are greatly in excess of its indebtedness.

Nor does this case present the question of invalidity of secret stipulations limiting the apparent liability of certain subscribers. Such stipulations have been frequently denounced as a fraud upon other subscribers, as well as creditors of the corporation. (2 Cl. & M. Pr. Corp., sec. 467c.) But the allegations of the complaint do not bring the case within the rule. No fact is alleged which would justify the inference that any fraudulent invasion of the rights of other stockholders (or, as already stated, creditors) had been attempted or would result.

Under the views stated, the complaint clearly states a cause of action on the agreement between Schulte and the defendant. This contract calls for the return of the purchase price, with interest. We cannot see that any different considerations apply to the Mitchell agreement. That instrument requires the corporation to pay one thousand two hundred and fifty dollars on the return of shares of the par value of one thousand dollars. But if the parties had the right to agree, upon the original sale of the stock, that the purchaser should have the option to return the stock and receive a money payment, it can make no difference whether the amount to be so paid was equal to, or more or less than, the original price. In either case the right to have the payment upon tender of the stock was reserved by the purchaser as a condition upon which he took his stock. The validity of the condition cannot depend upon the amount of the payment.

The judgment is reversed, with directions to the court below to overrule the demurrer, granting leave to the defendants to answer within a stated time.

Melvin, J., Henshaw, J., and Shaw, J., concurred.

[L. A. No. 2975. Department One.—January 9, 1913.]

H. C. VAN BUSKIRK, Respondent, v. J. T. KUHN, Administrator of the Estate of E. P. Reynolds, Deceased, Appellant.

STATUTE OF LIMITATIONS—PRESUMPTION AS TO FOREIGN LAW.—In the absence of proof, the law of a foreign jurisdiction with reference to limitations of actions is presumed to be the same as the law of this state.

ID.—PROMISE TO PAY DEBT “WHEN ABLE”—PERFORMANCE OF CONDITION.—A promise to pay a debt “when able” is conditional, and no cause of action accrues thereon until the condition is performed, that is to say, until the debtor is able to pay, and until then the statute of limitations does not commence to run.

ID.—COMPLAINT MUST ALLEGE ABILITY TO PAY—APPEAL FROM JUDGMENT.—In an action to enforce such a promise, it is essential to support a judgment for the plaintiff that the complaint should allege, and the court should find, the debtor’s ability to pay. A defect in so alleging and finding is reviewable on an appeal from the judgment.

ID.—DEFENSE OF STATUTE OF LIMITATIONS—DEFENDANT MUST PROVE BAR OF STATUTE.—In such an action, in order to establish the affirmative defense of the statute of limitations, it was incumbent upon the defendant to show that the debtor had the ability to pay his debt, and that a cause of action accrued against him more than the statutory time before the filing of the complaint.

APPEAL from a judgment of the Superior Court of Riverside County and from an order refusing a new trial. F. E. Densmore, Judge.

The facts are stated in the opinion of the court.

Collier, Carnahan & Craig, for Appellant.

Purington & Adair, for Respondent.

SLOSS, J.—The defendant appeals from a judgment against him, and from an order denying his motion for a new trial.

The action was brought to foreclose a mortgage on land in Riverside County. It is alleged in the complaint that in No-

vember, 1894, the defendant's intestate, E. P. Reynolds, Jr., who was then indebted to plaintiff in the sum of three thousand dollars for money loaned, borrowed of plaintiff the further sum of one thousand five hundred dollars, and promised to pay plaintiff the entire sum of four thousand five hundred dollars "whenever he, the said E. P. Reynolds, Jr., should be able to do so." This transaction took place at Wymore, Gage County, Nebraska. At the same time and place, Reynolds executed and delivered to plaintiff an instrument, in form a bargain and sale deed of the property above mentioned, the instrument being given and accepted as a mortgage to secure the payment of said sum of four thousand five hundred dollars. With the exception of three hundred and fifty dollars, the debt is unpaid. Reynolds died in December, 1907, and the defendant was, by the superior court of Riverside County, appointed administrator of his estate. Recourse against any property, other than that mortgaged, is waived.

The answer denies the making of the loan, and the execution of the mortgage. It also pleads the bar of the statute of limitations, specifying sections 361, 339 (subd. 1), and 337 (subds. 1 and 2) of the Code of Civil Procedure.

The findings were in favor of the plaintiff, and judgment of foreclosure followed.

The appellant's principal contention is that the evidence establishes that the action was barred by the statute of limitations, and particularly by section 361. Under that section, an action based upon a cause of action arising in another state cannot be maintained in this state after the lapse of time within which an action might have been maintained in the state in which the cause of action arose. There is an exception in favor of citizens of this state, but the plaintiff is not within the excepted class.

If, then, at the date of the filing of the complaint herein, an action on the debt could not have been maintained in Nebraska, the state in which the cause of action arose, the suit to foreclose the mortgage must be held to be barred here. (*Allen v. Allen*, 95 Cal. 184, [16 L. R. A. 646, 30 Pac. 213]; *Lilly-Brackett Co. v. Sonnemann*, 157 Cal. 192, [21 Ann. Cas. 1279, 106 Pac. 715].) There was no evidence of the Nebraska law with reference to limitation of actions, but, since, in the

absence of proof, the law of a foreign jurisdiction is presumed to be the same as our own (*Hickman v. Alpaugh*, 21 Cal. 225; *Flood v. Dunphy*, 147 Cal. 95, [81 Pac. 315]; *Lilly-Brackett Co. v. Sonnemann*, 157 Cal. 192, [21 Ann. Cas. 1279, 106 Pac. 715]), the period within which an action might have been brought in Nebraska on the oral agreement to repay the money loaned must be taken to be two years. (Code Civ. Proc., sec. 339, subd. 1.)

On the propositions just stated there is no dispute between the parties. They advance opposing views, however, regarding the time when a cause of action on the debt accrued. The loan was made in November, 1894. Reynolds died in December, 1907, and this action was commenced in May, 1910. There was, accordingly, a lapse of thirteen years after the making of the loan, until Reynolds's death, and over fifteen years until the filing of the complaint.

✓ The appellant contends that where a promisor agrees to make a payment "when able," his obligation is to pay within a reasonable time, and that the right to sue is barred at the expiration of such reasonable time. If the rule be as claimed, it will not be doubted that a delay of fifteen years is, *prima facie*, long enough to permit a reasonable time within which to sue, together with two years thereafter, to elapse several times.

✓ But the authorities in this state seem to establish a different rule for construing a promise to pay "when able." They support the respondent's contention that such a promise is conditional, and that no cause of action accrues until the condition is performed, that is to say, until the debtor is able to pay. | In *Curtis v. City of Sacramento*, 70 Cal. 412, [11 Pac. 748], the court said that "if the debtor promises to pay the debt when he is able, or by installments, etc., the creditor can claim nothing more than the promise gives him." | In *Rodgers v. Byers*, 127 Cal. 528, [60 Pac. 42], the defendant, being indebted to plaintiff, wrote to plaintiff before action was barred, saying, "I will liquidate that note as soon as I can get the money. . . . Will pay as soon as I can." It was held that plaintiff could not rely upon the statements as extending his time to sue upon the original obligation. His claim, said the court, was based upon a "substituted, conditional promise," and the proper action would have been one for the

breach of such promise, "in which it would have been necessary for the plaintiff to allege the promise and show the condition broken after defendant's ability to perform." (See, also, *Morehouse v. Morehouse*, 140 Cal. 88, [73 Pac. 738].) It follows that until the debtor becomes able to pay, the statute of limitations does not begin to run. The general current of authority is to this effect. (25 Cyc. 1350; 19 Am. & Eng. Ency. of Law, 2d ed. 193; *Tebo v. Robinson*, 100 N. Y. 27, [2 N. E. 383]; *Richardson v. Bricker*, 7 Colo. 58, [49 Am. Rep. 344, 1 Pac. 433]; *Mattocks v. Chadwick*, 71 Me. 313; *Scott v. Thornton*, 104 Tenn. 547, [58 S. W. 236]; *Barker v. Heath*, 74 N. H. 270, [67 Atl. 222].) Nothing contrary to this view is decided in cases like *Williston v. Perkins*, (51 Cal. 554) or *Earle v. Sunnyside Land Co.* (150 Cal. 214, [88 Pac. 920], where the promise was to pay out of a fund to be realized in a certain way. It was held in these and similar cases that there is an implied obligation to use reasonable diligence in performing the act upon which payment was contingent. In default of such diligence, payment becomes due without performance of the condition. But there is nothing in the facts before us to bring this case within the rule stated. It is not suggested that Reynolds was in any way derelict in his efforts to acquire the means to pay his debt.

Since the statute of limitations is an affirmative defense, it became incumbent upon the defendant, in order to establish this plea, to show that Reynolds had the ability to pay his debt, and that, accordingly, a cause of action against him accrued more than the statutory time before the filing of the complaint. The evidence on the subject is rather meager, and we think the court below was justified in making a finding, implied in the finding that the action was not barred, that Reynolds had not had such ability.

But if the views above expressed are sound, the very fact that prevents the statute from running (i. e., the lack of ability, on Reynolds's part, to pay his debt), operates also to prevent the plaintiff from maintaining his action. The reason that the statute does not run is that the promise is conditional upon the debtor's ability to pay, and that a cause of action does not accrue until such ability exists. If the promise is conditional upon such ability, it is, as is said in *Rodgers v. Byers*, 127 Cal. 528, [60 Pac. 42], incumbent upon the

plaintiff to allege and prove that the condition has been complied with. This is not, like the plea of the statute of limitations, matter of defense. It is a substantive part of the cause of action, and the burden of proof with respect to it, is upon the plaintiff. (*Bidwell v. Rogers*, 10 Allen, 438; *Boynton v. Moulton*, 159 Mass. 248, [34 N. E. 361]; *Veasey v. Reeves*, 6 Ind. 406; *Halladay v. Weeks*, 127 Mich. 363, [89 Am. St. Rep. 478, 86 N. W. 799]; *Parker v. Butterworth*, 46 N. J. L. 244, [50 Am. Rep. 407]). The complaint contains no allegation of such ability, and the court does not find it. There is, therefore, a want of averment and finding of facts establishing the existence of a cause of action. The plaintiff alleges a promise to pay in a certain event. He does not allege, and the court does not find, that the event upon which the obligation depends, has occurred. Neither the complaint, therefore, nor the findings, support the judgment. This defect is one that may be reviewed on an appeal from the judgment.

The result of these views being that the judgment must be reversed, it is unnecessary to consider the further points made by the appellant.

The judgment and the order denying a new trial are reversed.

Shaw, J., and Angellotti, J., concurred.

[Sac. No. 1974. Department One.—January 10, 1918.]

LEUTIE C. SNOWBALL, Executrix of the Last Will and Testament of Milton S. Snowball, Deceased, Respondent,
v. H. H. SNOWBALL, Administrator of the Estate of Lucy A. Snowball, Deceased, Appellant.

EVIDENCE—EXCLUSION OF TESTIMONY AS TO CONVERSATION—REVIEW OF RULING—SUBSTANCE OF CONVERSATION NOT SHOWN.—In an action to recover the amount due on promissory notes, which was defended on the ground of want of consideration, where a witness for the defendant had testified that he had a conversation with the payee of the notes, the refusal of the court to permit the witness to state what the conversation was, on the ground that it was immaterial, irrelevant, and incompetent, cannot be deemed erroneous or in itself

constituting ground for reversal, in the absence of any statement made to the trial court showing what the defendant claimed the substance of the conversation to be.

COMPROMISE OF DISPUTED CLAIM—CONSIDERATION—ABSENCE OF GOOD FAITH.—An agreement to settle a claim upon which suit has not been begun is not supported by a sufficient consideration if the party seeking to enforce it knew his claim to be groundless and did not assert it in good faith.

PROMISSORY NOTES—SETTLEMENT OF WILL CONTEST—INTENTION TO CONTEST—EVIDENCE.—In an action on promissory notes given by a mother to her son in settlement of his threatened contest of his father's will, and which was defended on the ground that there was no consideration for the notes due to the fact that the payee had no intention to make such contest at the time the notes were executed, the refusal of the court to permit a witness for the defendant to answer the question whether or not, about one month before the settlement, the payee had stated he had no intention of contesting the will and was satisfied with it, will not be deemed sufficiently prejudicial to require a reversal where there was no indication as to the nature of the answer the witness would have made to the question, and the evidence introduced left no doubt that the son subsequently had the intention to contest.

APPEAL from a judgment of the Superior Court of Yolo County. H. M. Alberty, Judge presiding.

The facts are stated in the opinion of the court.

Arthur C. Huston, for Appellant.

Charles W. Thomas, Charles W. Thomas, Jr., and Hudson Grant, for Respondent.

SHAW, J.—The defendant appeals from the judgment and presents the proceedings at the trial upon a bill of exceptions.

On March 7, 1906, Lucy A. Snowball executed to Milton S. Snowball two promissory notes, one for one thousand five hundred dollars, due two years thereafter, and the other for five hundred dollars, due three years thereafter. Afterward both the payer and payee died. This action was begun by the executrix of Milton S. Snowball's estate to recover from the estate of Lucy A. Snowball the amount due on said notes. After hearing the evidence the court below directed the jury to return a verdict for the plaintiff for the amount due upon

the notes. This was done and a judgment was entered accordingly.

The defense set up in the answer was that there was no consideration for the notes sued on. There was also an attempt to allege that the notes were procured by fraud exercised upon the maker by the deceased, Milton S. Snowball, and Leutie A. Snowball. Defendant charges that Milton and Leutie, for the purpose of inducing their mother to execute said notes, falsely stated to her that Milton intended to contest the will of John W. Snowball in order to secure a judgment that he died intestate, that Milton in fact had no intention to make such contest, but that the mother believed he did so intend, and that relying on that belief and on his said declarations that he did so intend, and by reason thereof, she executed the said notes, and that there was no consideration for the said notes. These allegations constitute a detailed statement of the defense that the notes were given without consideration. It is not alleged that they were given in settlement of the threatened contest or to induce Milton to refrain from making the same. The evidence, however, shows that they were given to accomplish that purpose. It is conceded that the evidence admitted was sufficient to establish the fact that the notes were given for a good and sufficient consideration. The only errors alleged are that the court erred in certain rulings excluding evidence offered by the defendant.

John W. Snowball, the husband of Lucy A. Snowball, died on February 5, 1906. He left four surviving children,—namely, Leutie A., Milton S., Leon, and H. H. Snowball. The will of John W. was admitted to probate on March 5, 1906, and Leutie A. Snowball was appointed executrix thereof. The facts shown by the evidence are substantially as follows: John W. Snowball's will was made some two years before his death. It gave to Milton two parcels of land. Milton had been living upon one parcel and paying the taxes thereon for some ten years and claimed that it belonged to him. The other tract was sold by John W. before his death. The will also gave to Leon bank stock of the value of two thousand dollars. Milton and Leon were dissatisfied with the provisions of the will in their favor and made threats to the mother, Lucy, and to their sister, Leutie, that they would

initiate a contest against it. Thereupon a settlement agreement was made between these four in pursuance of which said contest was abandoned. This agreement was made on the seventh day of March, 1906, and the notes in controversy were executed as a part thereof. In substance, the agreement was that Milton was to receive five thousand dollars and Leon was to receive the sum of five thousand dollars, in consideration whereof, they were to refrain from making the contest. Leutie was to give three thousand dollars to Leon and two thousand dollars to Milton, and Lucy, the mother, was to execute the two notes to Milton amounting to two thousand dollars, and Milton was to accept the lot which had not been sold and of which he claimed to be the owner, in lieu of one thousand dollars of the five thousand dollars to be received by him. In pursuance of this agreement Leutie gave the three thousand dollars to Leon and the two thousand dollars to Milton. Lucy executed to Milton the two notes sued on, and Milton and Leon thereupon executed to Leutie conveyances of all of their interest in the estate of their said father. Leutie agreed that upon the settlement of the father's estate she would reconvey the said home place to Milton. As a matter of fact they did abandon the contest and no such contest was ever filed or instituted.

H. H. Snowball was called as a witness for the defendant and he testified that after John W. Snowball's death and before his will was filed for probate, he had a conversation with Milton in regard to contesting his father's will. The will was filed on February 17, 1906. He was asked to state what the conversation was and the court refused to allow the question to be answered on the ground that it was immaterial, irrelevant, and incompetent. This ruling is assigned as error. The defendant made no statement to the court showing what he claimed the substance of the conversation to be, hence, it cannot be determined whether the exclusion of the evidence was erroneous or not, and this ruling of itself constitutes no ground for reversal. (*Marshall v. Hancock*, 80 Cal. 84, [22 Pac. 61]; *Houghton v. Clarke*, 80 Cal. 420, [22 Pac. 288]; *Taylor v. Kelley*, 103 Cal. 186, [37 Pac. 216].) As was observed in *Marshall v. Hancock*, "the conversation, if there was one, may have been about a matter entirely aside from the matter under investigation."

The witness was then asked whether or not after the father's will was read which was a few days after his death on February 5th, and before March 7, 1906, he had a conversation with Milton wherein Milton stated that he was satisfied with his father's will and had no intention whatever of contesting the same. An objection that this question was immaterial, incompetent, and irrelevant was sustained. A similar question as to a conversation after the seventh day of March was also excluded. It is claimed that these rulings are erroneous.

The evidence of the settlement agreement, of which the notes constituted a part, was introduced by the defendant, it is clear and positive, and there is no claim that it is not substantially correct. Milton and Leon, in consideration of the money and notes received by them, respectively, not only agreed not to contest the will, but each also conveyed to Leutie all his interest in the estate, thereby divesting himself of the right to make such contest. (Code Civ. Proc., sec. 1327; *Estate of Edelman*, 148 Cal. 236, [113 Am. St. Rep. 231, 82 Pac. 962]; *State v. Superior Court*, 148 Cal. 56, [2 L. R. A. (N. S.) 643, 82 Pac. 672]; *Estate of Wickersham*, 153 Cal. 612, [96 Pac. 311].) This conveyance was necessary in order to make the settlement secure and it formed a material part of the consideration for the notes. It is true that an agreement to settle a claim upon which suit has not been begun is not supported by a sufficient consideration if the party seeking to enforce it knew his claim to be groundless and did not assert it in good faith. (*McGlynn v. Scott*, 4 N. D. 24, [58 N. W. 460]; *McClure v. McClure*, 100 Cal. 343, [34 Pac. 822].) The answer to the question, if affirmative, might perhaps tend to prove bad faith in Milton. But a person's intentions readily change. An expression of intent at one time is but slight evidence that it has continued to a subsequent time, especially when, as here, the contrary purpose is positively declared on the subsequent occasion and is followed up by action to the extent of conveying a valuable right and interest. Counsel did not even state to the trial court that he expected an affirmative answer. It would have been better policy for that court to have admitted the evidence, but under the circumstances and in the absence of any indication as to the nature of the answer, we deem the error, if it can be so termed, to

be too trivial to justify a reversal. Declarations of intent not to contest, made after the settlement, would be entirely consistent therewith and would not tend to impeach the settlement agreement or to show bad faith in making the claim.

A considerable part of the discussion in the appellant's brief relates to the question of confidential relations and the effect thereof upon the duty of one to show good consideration for a contract in his favor made by another party to whom he stands in confidential relations. We do not think this question is of any importance. Although the relation between Milton and Lucy was that of parent and child, it is clear from the evidence that there was no confidential relation between them sufficient to impose upon him any duty to have his mother call in independent advice in the matter. Furthermore, the evidence also shows that the settlement was made upon the advice of an attorney called for that purpose by the mother herself.

There are no other points of sufficient importance to deserve mention.

The judgment is affirmed.

Sloss, J., and Angelotti, J., concurred.

Hearing in Bank denied.

[L. A. No. 2969. Department One.—January 11, 1913.]

HARRY GRAY, Respondent, v. GEORGE B. ELLIS and NORMAN W. CHURCH, Copartners doing business under the firm name of Ellis & Church, and THE NORTHERN INVESTMENT COMPANY (a Corporation), Appellants.

CORPORATIONS—SUBSCRIPTION TO STOCK IN PARTICULAR CORPORATION—APPLICATION TO STOCK IN DIFFERENT COMPANY—LIABILITY TO REFUND.—Where an agent authorized to obtain subscriptions to the capital stock of two different corporations, diverts money specifically paid him for a subscription to the original stock of one of such corporations, and attempts to apply it for a subscription to the stock

of the other, and the money is so received and applied by the other, both the agent and the corporation obtaining the money, although it may have had no knowledge of the terms on which the agent received it, are liable to refund it to the payer, as for money had and received to his use, if it was impossible to apply the money on account of a subscription for the stock of the intended corporation, due to the fact that all of the stock of that company had been subscribed for prior to the date of the payer's subscription.

ID.—CORPORATIONS OF SAME CHARACTER AND HAVING PROPERTY OF SAME VALUE.—It is immaterial to the right to recover such money that there was no difference in the value of the stock of the two companies, and that the property of one corporation was the same in character and value as that of the other.

ID.—INSTRUCTIONS REQUESTED BY APPELLANT.—The appellants cannot complain of instructions to the jury, which left them to determine whether under the subscription agreement the payers of the money had the right to elect which stock his money was to be applied on, if they joined in requesting instructions to that effect.

ID.—ORIGINAL SUBSCRIPTION TO STOCK—ACCEPTANCE OF STOCK ALREADY ISSUED.—One who has contracted to take stock in a company as an original subscriber thereto, cannot be compelled to accept from others, in satisfaction of his rights under such contract, any stock that had been subscribed for by, and issued to, other persons, and that was then owned by other persons.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial.
Leon F. Moss, Judge.

The facts are stated in the opinion of the court.

Denis & Loewenthal, for Appellants Ellis & Church.

Thomas O. Toland, Cedric E. Johnson, and T. F. Welch,
for Appellant Northern Investment Company.

Hatch & Lloyd, Hatch, Lloyd & Hunt, and Harvey D. Cheney, for Respondent.

THE COURT.—This is an appeal from a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial. The case was tried with a jury, which rendered a verdict in favor of plaintiff for the full amount claimed.

The action is one to recover \$2,250 paid by plaintiff to Ellis & Church on account of a subscription for the purchase of certain corporate stock, which money, it is substantially alleged, was diverted by Ellis & Church to payment on account of a subscription for stock in another and a different corporation from the one for whose stock he had subscribed, viz., the defendant Northern Investment Company, which diversion he promptly repudiated. The memorandum of agreement for such purchase executed by plaintiff is set forth in the complaint, the same being as follows:

“We, the undersigned, hereby severally agree to pay to Ellis & Church, agents, the sums set after our names respectively, on the following terms and conditions:

“Fifteen per cent (15%) in cash, and the balance as called for, being payments on account of purchase of stock of the Northern or Western Trust Companies, said Northern or Western Trust Companies’ stock representing bonds and stock of the Home Telephone Company of San Francisco:

Names.	Amounts to be paid.
S. W. Clark.....	\$ 3,000
C. C. Ames.....	15,000
F. C. Hornby	35,000
H. H. Barstin	10,000
Harry Gray	15,000
By H. D. L.	
John T. Bill	5,000”

Treating this contract as giving the plaintiff the right to elect or direct to which of the two corporations referred to his subscription should be made (the “Northern” or “Northern Trust Company” referred to therein being the defendant Northern Investment Company), it was alleged in the complaint that at the time of the payment of the money, plaintiff elected and directed that the same should be applied upon the purchase of stock in the Western Trust Company, and that said election and choice was agreed to and acquiesced in by said Ellis & Church, they so acknowledging in their receipt given for such money. It is further substantially alleged that Ellis & Church paid said money to the Northern Investment Company, on account of a subscription by plaintiff for stock of the last-named company, said company receiving the same and sending plaintiff a certificate for one hundred and fifty

shares therein, which he at once returned, repudiating the action of Ellis & Church in the matter, and declining to be considered a subscriber for any stock of said corporation. Defendant Northern Investment Company has ever since retained plaintiff's money, insisting that it is entitled to retain the same as on account of a subscription for its stock. It is further alleged that Ellis & Church have steadily refused to apply said money on account of a subscription for Western Trust Company's stock. We think the allegations of the complaint sufficiently show that Ellis & Church were the agents of both corporations in the matter. The answer clearly and definitely acknowledges that they were the agents of both corporations for the sale of the stock thereof, and that they were soliciting and receiving subscriptions from the public at large for the stock of both corporations, and for such subscription purposes were circulating agreements in the form set out in the complaint. It further appears from the answer and from the evidence that said corporations were formed solely to purchase and hold certain stocks and bonds of the Home Telephone Company of San Francisco, and the stock of both was of precisely equal value, share for share, and was based upon the said assets, to wit, stocks and bonds of said Home Telephone Company, and nothing else, and each share of stock of the Northern Investment Company represented the same number of stocks and bonds of said telephone company, as did each share of stock of the Western Trust Company. The only differences appear from the evidence to have been that the principal place of business of the Western Trust Company was the city of Los Angeles, while that of the Northern Investment Company was San Francisco, and that the officers of the two corporations, with the exception of the president, were different, the same person being president of each corporation.

The theory of plaintiff's complaint may fairly be said to be that both defendants are liable to him as for money had and received to his use. The money paid by him for a subscription for stock in one corporation to the agents of such corporation having been diverted by such agents to another corporation of which they were also agents, and attempted to be applied by such other corporation for and on account of a subscription for its own stock, he seeks to recover the amount

thereof on the ground that the law implies a promise on the part of both Ellis and Church and the Northern Investment Company to refund it.

If there was an unauthorized diversion of this money to the Northern Investment Company by Ellis & Church, its agents, we see no reason to doubt the liability of such corporation on this theory, regardless of whether or not it had knowledge at the time it received the money of the terms on which Ellis & Church received the money from plaintiff. It cannot profit by reason of the unauthorized act of its own agents in the matter of obtaining subscriptions for its stock, and must be held to hold plaintiff's money without right and under an implied promise to repay the same. And, of course, if Ellis & Church have devoted plaintiff's money to a purpose not authorized by him, they are liable therefor upon the same theory. All this is certainly true if, as the evidence shows without conflict, it is no longer possible to apply the money on account of a subscription for stock of the Western Trust Company, all of the stock of said company having been subscribed for prior to the date of plaintiff's subscription, and plaintiff's subscription clearly being solely for original stock.

We think that the amended complaint sufficiently states a cause of action against both defendants on the theory we have stated, and that the demurrers thereto were properly overruled. The various counts in which plaintiff has attempted to state his case, there being four, are not materially different in their effect, the allegations of the first count being made a part of each of the others.

It is obvious that it is no answer to plaintiff's claim, if in fact his contention as to an unauthorized application of his money is sustained, that there was no difference in the value of the stock of the two companies, and that the property of one corporation was the same in character and value as that of the other. Plaintiff had a perfect right to insist that his subscription, if he made one, should be for the stock of one corporation rather than the other, and that his money under no circumstances should be devoted to the purposes of a subscription for the stock of such other corporation. It may be that we can see no good reason why he should prefer one to the other, but that is no concern of the courts or of any one other than himself.

The memorandum of agreement did not clearly indicate who was to determine in which corporation, the Western Trust Company or the Northern Investment Company, plaintiff's subscription was to be placed, whether the matter was left to the discretion of Ellis & Church, or their principals, or was to be subsequently determined by plaintiff. Plaintiff's claim is that he had the right to determine this matter, and his evidence is squarely to the effect that when he paid the \$2,250 he directed that it be applied upon the purchase of stock in the Western Trust Company, and that this election and determination was agreed to and acquiesced in by Ellis & Church. The receipt given by them to plaintiff at said time indicates by its recitals that such was the case. There can be no doubt that there was sufficient evidence to support a conclusion that there was such an election and direction on the part of plaintiff, and that Ellis & Church agreed thereto and received the money with such an understanding.

The question whether the written agreement gave to plaintiff the right to elect which stock his money was to be applied on was left to the jury by the instructions. It is urged that there was no such uncertainty as to make this a question for the jury, and that the court should have determined, as matter of law, what the agreement meant in this respect. We may so concede for all the purposes of this decision. The difficulty with defendants' position in this regard is that they joined in requesting instructions to the effect stated. For instance, one of their requested instructions, which was given, was in part as follows: "You must then determine from the evidence whether the subscription of Mr. Gray to the stock of the Northern Investment Company or Western Trust Company meant that he was to choose the company in which the stock was to be purchased, or whether the defendants Ellis & Church had a right to put him as a subscriber in either of said companies as they might elect." Another of defendants' requested instructions, also given, was in part as follows: "You are to determine from the evidence whether or not at the time of the issuance of said receipt, or prior thereto, it was agreed between Ellis & Church and plaintiff that stock of the Western Trust Company was to be delivered, and what the arrangement was between said parties, as to the delivery

of stock, whether of the Western Trust Company or the Northern Investment Company." Another instruction requested by defendants and given by the court was to the effect that if the jury found that the right to place plaintiff's subscription in either the Northern Investment Company or the Western Trust Company was in Ellis & Church, and they elected the Northern Investment Company, the verdict should be for defendants. These requested instructions were all along the same lines as those given at the request of plaintiff on this branch of the case, and show the theory upon which all the parties proceeded on the trial of the cause. Defendants are not at liberty to complain here of action by the trial court which was entirely in accord with their own requests. The point here sought to be made in this regard is based entirely on instructions given to the jury, no objection having been made by defendants, so far as appears, to the introduction of any of the evidence bearing on the question.

The evidence without conflict shows that all of the Western Trust Company stock had been subscribed for prior to the time of plaintiff's subscription, and that at no time thereafter could such company have accepted the subscription of plaintiff or delivered him any stock thereon. The company's stock had been fully subscribed for. Plaintiff's contract was simply to take stock from the company as an original subscriber. If by reason of his election his subscription was for Western Trust Company's stock, as the jury has in effect found, and the stock of that company had then been fully subscribed for by others, he could not be compelled to accept from others, in satisfaction of his rights under such contract, any stock that had been subscribed for by, and issued to other persons, and that was then owned by other persons. Under such circumstances it appears to be entirely immaterial whether Mr. Ellis or the president of the Northern Investment Company, at any time tendered to plaintiff stock of the kind above described, owned by them, in lieu of the original Northern Investment Company's stock for which it was claimed that he had subscribed, and it follows that instruction H given by the court on its own motion, which is the instruction most seriously complained of by defendants, was not erroneous.

In view of what we have said, we find no prejudicial error of which defendants may here be heard to complain in the action of the trial court in regard to any other instruction.

There is no other matter requiring notice.

The judgment and order denying a new trial are affirmed.

[L. A. No. 2868. Department Two.—January 14, 1913.]

JAMES LONNERGAN, Respondent, v. CHARLES STANSBURY and J. B. HUGHES, Copartners, etc., Appellants.

NEGLIGENCE—EMPLOYER AND EMPLOYEE—FURNISHING SAFE APPLIANCES.

While a master is not obliged to furnish his employee with the latest improvements in machinery, tools, or appliances, he is always under the duty in the use of proper care, to furnish him with suitable machinery, tools, and appliances.

ID.—WAGON WITHOUT BRAKE AND WITH INSECURE SEAT—QUESTION FOR JURY.—Whether a wagon, furnished by an employer to his teamster for the purpose of hauling brick over a hilly road, was an unfit instrumentality by reason of its having no brake and an insecure seat, is a question for the jury, in an action by the employee to recover damages for personal injuries occasioned by the running away of the team attached to the wagon, while going down a grade.

ID.—ASSUMPTION OF RISK BY TEAMSTER—USE OF UNSAFE WAGON FOR ONE DAY.—It cannot be said, as matter of law, that the teamster assumed the risk of the defective condition of such wagon, where, after protesting concerning the absence of a brake and receiving the assurance of the foreman that he would not need one, he undertook the work with it, and was injured on the first day while so employed.

ID.—INSTRUCTIONS—DUTY TO FURNISH SUITABLE APPLIANCES—FAILURE TO EXERCISE REASONABLE CARE.—In an action to recover for such injuries, a preliminary instruction declaring it to be a part of the duty of the employer "to furnish suitable appliances by which the service is to be performed and to keep them in repair and order and to make such provisions for the safety of the employees as will reasonably protect them from the dangers incident to their employment," will not be deemed erroneous for its failure to announce that the employer is liable only if he has failed to exercise reasonable care and diligence in the selection and furnishing of such appliances, if such qualification of his liability is repeatedly stated in subsequent instructions.

ID.—MEASURE OF DAMAGES—DAMAGES REASONABLY PROBABLE TO RESULT IN FUTURE.—An instruction in such action, that if the jury found for the plaintiff, he was entitled to recover for all damages proximately resulting from the injury which he has suffered up to the time of the trial, and for all such damages that it is "reasonably probable" that he will sustain in the future, is not rendered erroneous by the use of the phrase "reasonably probable," if it sums up its declaration of the law with the pronouncement of the correct rule embodied in section 3283 of the Civil Code, that he is entitled to recover for all damages "certain to result in the future."

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Leon F. Moss, Judge.

The facts are stated in the opinion of the court.

Scarborough & Bowen, for Appellants.

Morton, Riddle & Hollzer, for Respondent.

HENSHAW, J.—Plaintiff was a teamster employed by defendants, a contracting firm. His horses ran away. He was thrown from the wagon in which he was riding and sustained injuries. His action for damages against his employers resulted in a verdict and judgment in his favor. From that judgment and from the order denying their motion for a new trial the defendants appeal.

The gravamen of the complaint lies in the allegation that defendants furnished to plaintiff a wagon that was dangerous and unfit to be used, in that there was no brake or other appliance provided by means of which the wagon could be impeded or stopped; that the sides of the wagon were loosely and insecurely placed upon and attached to it, and thereby plaintiff's seat, which consisted of a board placed horizontally across the sides, became insecure and dangerous. It is then alleged that while plaintiff engaged in his work was driving this empty wagon down a hill, the horses became unmanageable, ran away and because of the swaying wagon box and shifting seat and absence of brake the plaintiff was unable to control them and was thrown from the wagon, when, in their career, they dashed it against the curb.

The testimony supporting these allegations is sufficient. That of the plaintiff is to the effect that he was experienced in the use of horses; had been a teamster, and had driven this particular team of horses, which, it is conceded, were ordinarily gentle. He was told to put his horses in this particular wagon upon the morning of the accident and to haul bricks from a brick-yard, delivering them at various points where defendants were engaged in work. Prior to the accident he had never driven a wagon that was not equipped with a brake or some appliance for stopping it. When told by the foreman to use this particular wagon he noticed that it was without a brake and told the foreman that he wanted a brake on the wagon. The foreman replied that he needed no brake, as his draught was uphill; that he would have to haul brick but one day, and on the following day would go back to his former employment—that of driving a dump wagon. There was no seat in the wagon, simply a loose board across the side-boards. The seat shifted so, because of the swaying of the wagon box, that he tried to drive standing in the wagon, but he could not stand because of the swaying of the wagon bed. Once or twice during the day, on down grades, the team had started with him, but he had checked them. At the time of the accident he was returning with the team from his work. The horses had galled necks, the galled places being more inflamed at night after the day's work than in the morning. As he started down the grade it is probable that the first horse started because of the pain produced by the collar bearing on its galled neck in holding back the weight. The plaintiff at the time "had the lines through his hand." The other horse became frightened, and the first one lunged ahead and "the two horses just plunged right down that grade." The wagon box began to swing from side to side, the loose board upon which he was sitting fell off and precipitated plaintiff on his back in the wagon. He recovered himself as quickly as possible, but too late to prevent the wagon striking the curb.

This sufficiently indicates the evidence in the case, and from it appellants urge that there is not the slightest evidence of negligence upon their part, and, in the same connection, that whatever were the defects in the appliances, furnished to plaintiff, he, as a skilled teamster, knew them, knew their

danger and accepted their risk. As to the first of these propositions, however, while it is quite true that the master is not obliged to furnish his employee with the latest improvements in machinery, tools, or appliances, he is always under the duty in the use of proper care to furnish him with suitable machinery, tools, and appliances. It was at least for the jury in this case to say whether, for the work in which the plaintiff was engaged, a wagon such as was furnished by defendants came up to the requirements of the law as a suitable instrumentality. To the argument of appellants that it is not established that the lack of brake and insecure seat were, or was either of them, the proximate cause of the injury, it must be answered that while in such a case as this it never can be demonstrated beyond peradventure that if the seat had been secure, or if there had been a brake, the accident would have been avoided, still enough is shown to establish the probability, at least, that with the brake and the secure seat he could have controlled the horses which were recognized as being ordinarily a gentle team.

Upon the proposition of assumed risk, it is true that, after protest concerning the absence of a brake and the assurance of the foreman to the effect that he would not need one, plaintiff undertook the work with the wagon furnished. It is probably not true that he quite appreciated the defective condition of the wagon bed until he learned it by experience in driving. But this experience was his first day's experience. Unless we can say, under these circumstances, that it was the duty of the plaintiff to have abandoned his work upon the discovery, then we cannot say, as a matter of law, that plaintiff had assumed the risks with full appreciation of their nature and danger. But such a peremptory assertion of right and sudden cessation of employment is not expected of one in a dependent position. The case upon which appellants principally rely, and the one nearest to the case at bar in its facts, is *Limberg v. Glenwood Lumber Co.*, 127 Cal. 598, [49 L. R. A. 33, 60 Pac. 176]. There an experienced teamster fell or was thrown from his wagon and suffered the loss of a leg. He sued, alleging as here, the furnishing of defective appliances. The defects consisted "of a wagon having no seat and also a pair of lines that were too short." The opinion of this court goes off upon the concession that the

appliances were defective, but holds that as plaintiff had continuously used them for a period of eleven months, without objection or protest of any kind, it must be held that he assumed all of the risks incident to their use. What has already been said makes plain the broad distinction between that case and the case at bar, where plaintiff had in fact protested over the absence of a brake, had been assured that he would not need a brake, and where he was engaged in his first day's employment with the defective appliance, under an assurance that the first would be the only day. These questions then were properly submitted to the jury, and its determination will not here be disturbed.

Touching asserted errors in the giving and refusing to give instructions, preliminarily it may be said that the instructions were quite as favorable to the defendants as the law warrants. In one of its earliest instructions, the court, speaking generally of the employer's duty, declared a part of that duty to be "to furnish suitable appliances by which the service is to be performed and to keep them in repair and order and to make such provisions for the safety of the employees as will reasonably protect them from the dangers incident to their employment." It is contended that this instruction was erroneous, in its failure to announce that the employer is liable only if he has failed to exercise reasonable care and ordinary diligence in the selection and furnishing of such appliances. If this instruction were standing alone, appellants' contention would have much force. (*Sterne v. Mariposa Com'l. Co.*, 153 Cal. 516, [97 Pac. 66].) But it is manifestly a preliminary announcement, and sound enough in and of itself. In point of law it is the employer's duty so to do, but in point of law he has fulfilled that duty when he has exercised ordinary care and diligence in securing proper appliances. All this was abundantly set forth in numerous instructions. It is found in many specific instructions proposed by the defendants and given by the court. So that we repeat, while if the instruction complained of stood alone, it would be impeachable as not containing a full exposition of the law, taken in connection with the numerous explanatory instructions which followed, there could have been no misunderstanding upon the part of the jury. The case does not present at all the same situation shown by the instructions in *Melone v. Sierra Rail-*

way Co., 151 Cal. 114, [91 Pac. 522]. There the instructions were in absolute conflict and, it was said by this court, that it could not be determined under which the jury acted. Here there is no conflict in the instructions. There is in the preliminary instruction the absence of a qualification, the lack of a full exposition of the law, which absence and lack are fully and harmoniously set forth in all the succeeding instructions. Upon the measure of damages the court gave an instruction identical with one reviewed in *Hersperger v. Pacific Lumber Co.*, 4 Cal. App. 460, [88 Pac. 587, 591]. The instruction was there affirmed, and a petition for a hearing of the cause before this court was denied. The phrase "reasonably probable" may well be omitted from all such instructions and the statutory requirement of the Civil Code (sec. 3283) strictly adhered to. That section declares that a plaintiff is entitled to damages for "detriment resulting after the commencement thereof or *certain to result* in the future." But the instruction here in question, while using the unhappy phrase "reasonably probable," sums up its declaration of the law with the pronouncement of the correct rule.

For these reasons the judgment and order appealed from are affirmed.

Melvin, J., and Lorigan, J., concurred.

[Sac. No. 1953. Department Two.—January 14, 1913.]

M. L. FITZGERALD, Respondent, v. COUNTY OF MODOC
et al., Defendants. T. F. DUNAWAY, Appellant.

DEED—CONDITIONS SUBSEQUENT—CONSTRUCTION.—Conditions subsequent in a deed tending to restrict and defeat an estate are not favored. They can be created only by apt and appropriate language which *ex proprio vigore* establishes that only a conditional estate was conveyed, and when such a condition is shown to have been created, the rule of construction is that of strictness against the grantor and in favor of the holder of the estate.

ID.—CREATION OF CONDITIONS SUBSEQUENT.—Generally, the apt and appropriate words evidencing that a grant is on condition subsequent are found in a provision for forfeiture and right of re-entry. If,

however, the language employed declares a condition and imports a forfeiture, a clause of re-entry is not necessary.

ID.—RECITAL OF PURPOSE FOR WHICH LAND IS CONVEYED.—A provision in a deed to a county merely reciting that the land conveyed is “to be used as and for a county high school ground and premises,” for the grantee, does not create a condition subsequent.

ID.—CIRCUMSTANCES UNDER WHICH DEED WAS MADE.—The facts and circumstances under which such deed was made, if not expressed in the deed itself, cannot be considered to enlarge or restrict the estate actually granted.

APPEAL from a judgment of the Superior Court of Modoc County. N. P. Arnot, Judge presiding.

The facts are stated in the opinion of the court.

Dodge & Barry, for Appellant.

Charles R. Holton, for Respondent.

HENSHAW, J.—In its form this is a simple action to quiet title, brought against the county of Modoc and T. F. Dunaway, the complaint alleging title in plaintiff to nine acres of land in the county of Modoc, and asserting that the defendants set up some claim of right or title thereto. The county of Modoc disclaimed. Defendant Dunaway answered, alleging title in himself. The findings declare plaintiff to be the owner of the land, that Dunaway’s claim is without right, and judgment followed accordingly. Defendant Dunaway appeals.

By the evidence it appears that the action is in fact one to enforce a forfeiture upon breach by the grantee, the county of Modoc, of an asserted condition subsequent, contained in a deed to the land made by plaintiff to the county of Modoc. Preliminarily appellant urges that, such being in fact the nature of the action, wherever plaintiff relies upon a forfeiture he must plead it. We will not pause, however, to enter into a discussion of this question, since under the circumstances, it is better for all of the litigants that the controversy should be settled upon its merits.

Plaintiff made a deed to the county of Modoc which conveyed by appropriate description the land here in controversy, and contained immediately following the description the fol-

lowing clause: "To be used as and for a county high school ground and premises, for the county of Modoc, state of California." Evidence is lacking as to whether or not the land was ever used for the indicated purpose, but the breach of the asserted condition subsequent rests upon the fact that admittedly the county of Modoc did convey this land to the defendant Dunaway.

It is fundamental that conditions subsequent tending to restrict and defeat an estate are not favored. They can be created only by apt and appropriate language which *ex proprio vigore* establishes that only a conditional estate was conveyed, and when such a condition is shown to have been created, the rule of construction is that of strictness against the grantor and in favor of the holder of the estate. Generally speaking, the apt and appropriate words evidencing that the grant is on condition subsequent are found in a provision for forfeiture and right of re-entry. "Reciting in a deed that it is in consideration of a certain sum, and that the grantee is to do certain things, is not an estate upon condition, not being in terms upon condition, nor containing a clause of re-entry or forfeiture." (2 Washburn on Real Property, 4, 8; *Cullen v. Sprigg*, 83 Cal. 56, [23 Pac. 222].) Of course, where the language employed declares a condition and imports a forfeiture, a clause of re-entry is not necessary. (*Papst v. Hamilton*, 133 Cal. 631, [66 Pac. 10]; *Behlow v. Southern Pacific R. R. Co.*, 130 Cal. 16, [62 Pac. 295]; *Hawley v. Kaffitz*, 148 Cal. 393, [113 Am. St. Rep. 282, 3 L. R. A., (N. S.) 741, 83 Pac. 248]; *Cleary v. Folger*, 84 Cal. 316, [18 Am. St. Rep. 187, 24 Pac. 280]; *Quatman v. McCray*, 128 Cal. 285, [60 Pac. 855].) Under no decision of this or any other court, within our knowledge, has language such as is here used ever been construed to create a condition subsequent. At the least it is but a declaration of the purpose for which the grantor expected the land would be used. At the most it is but a covenant. The cases from this court which respondent contends support his argument that this language created a condition subsequent, are far from sustaining him. In *Parsons v. Smilie*, 97 Cal. 647, [32 Pac. 702], the language of the deed was: "This deed is given and accepted on the following conditions, which are to be binding on the party of the second part, his heirs and assigns forever, to wit . . .

and a failure to comply with the same will render this conveyance null and void, and said premises shall revert to said first party." Here was a clear and complete condition subsequent. In *Papst v. Hamilton*, 133 Cal. 631, [66 Pac. 10], the conveyance was "upon the conditions, however, that the premises shall be used solely," etc., "and for no other purpose whatever." The indicated purpose was for the maintenance of a college or academy. There had been a failure and abandonment of the premises and the grantor had re-entered and taken possession of them. It was clear that the estate was created upon condition. There had been an actual re-entry, and the decision of this court was simply to the effect that, under these circumstances, plaintiff is "in a position to maintain his action for the cancellation of the deed and the quieting of his title." In *Liebrand v. Otto*, 56 Cal. 242, an action to have declared and enforced a forfeiture, the declaration of this court is that the plaintiff had granted certain lands to the Santa Cruz Railroad Company upon certain expressed conditions to be performed by the latter. The railroad company had failed to perform and plaintiff had re-entered. It was held that his re-entry and continued possession excused his delay in resorting to equity to remove the cloud from his title. In *Quatman v. McCray*, 128 Cal. 285, [60 Pac. 855], the deed declared as follows: "And this conveyance is made upon the following express condition, namely:" etc. The defense was merely that there had been no breach of the condition. We have thus briefly considered the California cases upon which respondent relies. Upon the other hand, such cases as *Ecroyd v. Coggeshall*, 21 R. I. 1, [79 Am. St. Rep. 741, 41 Atl. 260]; *Packard v. Ames*, 16 Gray, (Mass.) 327; *Kilpatrick v. Mayor of Baltimore*, 81 Md. 179, [48 Am. St. Rep. 509, 27 L. R. A. 643, 31 Atl. 805]; *Faith v. Bowles*, 86 Md. 13, [63 Am. St. Rep. 489, 37 Atl. 711]; *Rawson v. School Dist.*, 7 Allen, (Mass.) 125; *Page v. Palmer*, 48 N. H. 385; *Cunningham v. Parker*, 146 N. Y. 29, [48 Am. St. Rep. 765, 40 N. E. 635]; *Sumner v. Darnell*, 128 Ind. 38, [13 L. R. A. 173, 27 N. E. 162]; *Clements v. Burtis*, 121 N. Y. 708, [24 N. E. 1013]; *Thornton v. Trammel*, 39 Ga. 202; *Rainey v. Chambers*, 56 Tex. 17, and *Owsley v. Owsley*, 78 Ky. 257, are all cases to which many more might be added, which construe language, much more per-

tinient than that employed in the case at bar, as being insufficient to create a condition subsequent. Here the grantor did no more than to indicate his purpose in making the deed and the use to which he expected the land to be put. But such language is entirely inadequate to create a condition. (*Mausey v. Mausey*, 79 Va. 537.)

We are not forgetful of the principle which holds in mind the circumstances under which such a deed is made, and the fact whether or not an adequate consideration has been paid therefor by the grantee. (*Ecroyd v. Coggeshall*, 21 R. I. 1, [79 Am. St. Rep. 741, 41 Atl. 260]; *Faith v. Bowles*, 86 Md. 13, [63 Am. St. Rep. 489, 37 Atl. 711].) These facts and circumstances, of course, cannot tend to enlarge or restrict the estate actually granted. They are of value only as an aid in arriving at the actual intent of the parties. But whatever that actual intent may have been, it must have found adequate expression in the deed itself before it can be given either legal or equitable efficacy.

The judgment appealed from is therefore reversed, and the cause remanded.

Melvin, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[L. A. No. 3246. In Bank.—January 14, 1913.]

JOHN H. HOBBS, Appellant, v. TOM REED GOLD MINING COMPANY (a Corporation), et al., Respondents.

CORPORATION AGENT AND TRUSTEE FOR STOCKHOLDERS—DIRECTORS AS TRUSTEES.—A corporation is the agent and trustee of its stockholders, in their behalf and for their use and benefit holding, controlling, and managing the corporate property and business. The directors are the trustees for the stockholders and also for the corporation.

MANDAMUS—OPERATION OF PERSONAL WRITS—TERRITORIAL LIMITATIONS. Personal writs cannot run to persons who are not present in the state, and they cannot be enforced upon real property beyond its limits. The writ of mandate cannot be invoked to compel perform-

ance of an act which cannot be performed within this state but must be done, if at all, at some place in another state.

Id.—FOREIGN MINING CORPORATION—STOCKHOLDER'S RIGHT TO INSPECT—MANDAMUS TO ENFORCE RIGHT—ORDER BY DIRECTORS TO PERMIT INSPECTION.—The courts of this state have power to issue a writ of mandate, at the instance of a stockholder in a mining corporation organized under the laws of a foreign state, and whose mining property was there situated, but which had its principal place of business, and all of whose directors resided, in this state, commanding the directors to make and deliver to such stockholder an order to the persons in charge of the mine, instructing them to permit the stockholder to enter and examine the same. Ample power to compel obedience to such writ is conferred by section 1097 of the Code of Civil Procedure, although, doubtless the power would exist in the absence of such express grant.

Id.—RIGHT OF VISITATION AND INSPECTION.—A stockholder of a mining corporation has the right to visit and inspect the mines of the company, both at common law, and by virtue of section 589 of the Civil Code.

Id.—MANDAMUS TO ENFORCE RIGHT—RIGHT AT COMMON LAW AND UNDER STATUTE.—Where such right of visitation and inspection is given by statute, the rule is that, unless the statute imposes restrictions or limitations, the right is absolute and may be enforced by *mandamus*, regardless of the purposes or motives of the stockholder, or the existence of good cause. Where the right to be enforced is a common law right, the issuance of the writ is discretionary, and the motives of the stockholder may be questioned, and he is required to show good cause for granting the relief.

Id.—PRESUMPTION AS TO LAW OF FOREIGN STATE—IDENTITY WITH LAW OF THIS STATE.—In a proceeding by *mandamus* against such a foreign mining corporation to enforce a stockholder's right of visitation and inspection, it must be presumed, in the absence of a contrary showing, that the laws of the foreign state under which the corporation was organized and where its mines were situated, conferred the same right to visit and examine as that provided for by section 589 of the Civil Code of the state. If it should appear that such foreign state had no such law, substantially the same right and duty would exist under the common law, provided the inspection was desired for a legitimate purpose and good cause was shown therefor.

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

J. W. McKinley, Thomas Bryant, Nye & Malburn, and H. L. McNair, for Appellant.

N. P. Moerdyke, and Hunsaker & Britt, for Respondents.

SHAW, J.—This is a proceeding in *mandamus*.

The writ of mandate may be issued to any corporation, board or person “to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use or enjoyment of a right” to which he is entitled, and there is not a plain, speedy, and adequate remedy in the ordinary course of law. (Code Civ. Proc., secs. 1085, 1086.)

The natural persons named as defendants to the action are the persons composing the board of directors of the corporation defendant and including its president and secretary. The plaintiff is a holder of stock in the defendant corporation. A corporation is the agent and trustee of its stockholders, in their behalf and for their use and benefit holding, controlling, and managing the corporate property and business (*Wright v. Oroville M. Co.*, 40 Cal. 27; *Ashton v. Dashaway Assoc.*, 84 Cal. 65, [7 L. R. A. 809, 22 Pac. 660, 23 Pac. 1091]). The directors are the trustees for the stockholders and also for the corporation. It is practically conceded that there is no plain, speedy, and adequate remedy in the ordinary course of law whereby the plaintiff may obtain the relief he seeks. The foregoing statements show that the defendants occupy the position of official trustees from which duties may arise to perform acts on behalf of the plaintiff. The two questions presented for determination are: 1. Whether or not upon the facts alleged in the complaint, there is any act which the law specially enjoins as a duty resulting from this trust or station; and, 2. Whether or not the superior court of Los Angeles County can enforce performance of such act by means of the writ of mandate.

Tom Reed Gold Mining Company is a corporation organized under the laws of Arizona and having its principal place of business in Pasadena in Los Angeles County, California, and it there maintains an office and holds meetings of its directors. All of the directors, the president and secretary being members of board, reside in Los Angeles County. None of them “reside or remain” in Arizona. The company owns a gold mine in Arizona, the operations of which are carried on by

agents and employees in Arizona and subject to the direction and control of said board of directors. The plaintiff owns more than two thousand shares of the stock of said company. Having heard that there had recently been a discovery of a new body of ore in the underground workings of said mine and desiring to examine said mine and inspect said ore and ascertain whether the mining operations were carried on with skill and good judgment, so as to be advised of the value of his stock, the plaintiff demanded of the company permission to visit, inspect and examine the mine accompanied by an expert mining engineer to assist him. The company refuses to permit him to do so.

The prayer of the complaint is for a writ of mandate commanding the defendants to permit plaintiff to visit, inspect, and examine said mine, accompanied by a mining engineer to assist him therein, and requiring defendants to make and deliver to plaintiff an order directed to its agents and servants in charge of the mine, instructing them to show him such parts of the mine as he wishes to examine, and for such other relief as may be just and proper.

The mine being in Arizona it is not within the jurisdiction of the courts of this state. Our personal writs cannot run to persons who are not present in the state and they cannot be enforced upon real property beyond its limits. The writ of mandate cannot be invoked to compel performance of an act which cannot be performed within this state but must be done, if at all, at some place in another state. So far as these objections go the refusal of the writ was proper.

But there is an act in furtherance of the proposed inspection which the defendants may perform, and which it is their duty to perform in this state, to which the plaintiff upon the facts stated is clearly entitled and which comes within the scope of the relief prayed for. The corporation holds its director's meetings in this state, its directors reside here and the corporate business, in part, at least, is done here. The corporation, although organized under the laws of Arizona, is for many purposes a resident of this state. (*Wait v. Kern, R. M. Co.*, 157 Cal. 21, [106 Pac. 98].) Its directors, acting in this state, may make and deliver to the plaintiff an order to the persons in charge of the mine, instructing them to permit the plaintiff to enter and examine the same. In the

ordinary course of business it is to be presumed that such an order would be made in this state, rather than in Arizona, since the directors and officers reside here and hold meetings here. There is, therefore, no physical or jurisdictional obstacle to prevent the issuance and execution of a writ of mandate to compel the defendants to perform such act. Ample power to compel obedience is conferred by section 1097 of the Code of Civil Procedure, although, doubtless, the power would exist in the absence of such express grant. There is, therefore, an act which the defendants may do in this state in their trust capacity, the performance of which the court can compel.

The remaining question is whether or not this act is a duty resulting from the relations between the parties. Has a stockholder of a mining corporation the right to visit and inspect the mines of the company? We think there can be no doubt that the right exists. It is settled that at common law a stockholder has the right to inspect the books of the corporation. (2 Cook on Corporations, sec. 511; 4 Thompson on Corporations, sec. 4406 et seq.) The reasoning on which this rule is founded is that a stockholder has an interest in the assets and business of the corporation and that such inspection may be necessary or proper for the protection of his interest or for his information as to the condition of the corporation and the value of his interests therein. There is not a feature of this reasoning that does not apply with equal force to the claim of a right to examine the property of the corporation, especially where it is mining property, the condition and value of which is so easily concealed or misrepresented. The books would often afford no information of the nature of the ore bodies exposed or of the manner in which the work was carried on. "The stockholders of a corporation are the owners of its franchises and its assets and they have a right to be informed of the financial condition of the company." (*Kuhbach v. Irving etc. Co.*, 220 Pa. St. 431, [20 L. R. A. (N. S.) 185, 69 Atl. 981].) In *Guthrie v. Harkness*, 199 U. S. 153, [50 L. Ed. 131, 4 Ann. Cas. 433, 20 Sup. Ct. Rep. 5], the court quotes with approval the following passage from *Cockburn v. Union Bank*, 13 La. Ann. 269: "A stockholder in a corporation possesses all his individual rights, except so far as he is deprived of them by the charter or the

law of the land; as long as the charter or the rules and by-laws, passed in conformity thereto, do not restrict his individual rights, he possesses them in full and can demand to exercise them. It cannot be denied that it is the right of one to see that his property is well managed and to have access to the proper sources of knowledge in this respect." Again the court says (199 U. S. 155, [50 L. Ed. 130, 4 Ann. Cas. 433, 26 Sup. Ct. Rep. 6]): "The right of inspection rests upon the proposition that those in charge of the corporation are merely the agents of the stockholders who are the real owners of the property," citing *Cincinnati V. Co. v. Hoffmeister*, 62 Ohio St. 201, [78 Am. St. Rep. 707, 48 L. R. A. 732, 56 N. E. 1033]. In the Guthrie case the United States supreme court held that the stockholders had the right, not only to inspect the books of the banking company, but also to examine its accounts and loans, or in other words, its property. It would, indeed, be a strange rule which would allow the stockholder to examine the books of a corporation to ascertain its condition and deny him an inspection of the property to verify the statements contained in the books. The rule at common law, in our opinion, extends to the corporate property as fully as to the books.

Where such right is given by statute, the rule is that, unless the statute imposes restrictions or limitations, the right is absolute and may be enforced by *mandamus*, regardless of the purposes or motives of the stockholder, or the existence of good cause. (*Johnson v. Langdon*, 135 Cal. 626, [87 Am. St. Rep. 156, 57 Pac. 1050].) Where the right to be enforced is a common law right, the issuance of the writ is discretionary, and the motives of the applicant may be questioned, and he is required to show good cause for granting the relief. (Ibid.) Section 589 of our Civil Code provides that any stockholder of a mining corporation, formed under the laws of this state, is entitled to visit and examine its mines accompanied by his expert, and that on his application the president of the corporation must cause its secretary to issue and deliver to him an order to the superintendent of the mine to show the stockholder such parts of the mine as he may wish to see. The case was decided below on a demurrer to the complaint, which contains no allegations as to the law of Arizona on the subject. It is therefore presumed to be the

same as the law of this state. Conceding for the purposes of this decision the claim of the defendant that section 589 does not apply to an Arizona mining corporation having its principal place of business in this state, and having mines only in Arizona, it would follow that under the law of Arizona, as we presume it to be, the same right would exist, and the same duty would rest upon the defendants, as under the section of the Civil Code above mentioned. If it should turn out that Arizona has no such law and that section 589 should be held inapplicable, substantially the same right and duty would exist under the common law, provided the inspection was desired for a legitimate purpose and good cause was shown therefor.

It is suggested that the court should not indulge in useless or ineffectual proceedings and that it would be useless to require the officers of the corporation to give an order to the mining superintendent in Arizona to allow an inspection of the mine, unless the court possessed the power and the means to compel the superintendent to obey the order. There seems to be a suggestion here that the defendants are disposed to be refractory and to resist the judgments of the courts of this state so far as they dare, while at the same time availing themselves of the privilege of carrying on the general corporate business here. We will not indulge the supposition that this motive or intent exists. Obedience to the writ commanding the issuance of a permit, means an obedience in good faith with the sincere intent to carry out the judgment of the court, and we will presume that such obedience will be promptly accorded. It is true, the court cannot send its officers into Arizona to induct plaintiff into the mine, but it can compel the issuance by the defendants in this state of the order for the inspection thereof, under such restrictions as may seem proper, and it can see that there is no trifling with the court in the manner of performing that act. It is not to be supposed that the mine superintendent will disobey or disregard a real order from his superiors. The court will give such relief as its powers and territorial jurisdiction authorizes it to give. It will not refuse any relief because it cannot give the full relief that plaintiff asks, or because it cannot act directly upon the premises to which the relief relates. From what we have said the conclusion necessarily

follows that the court below erred in sustaining the demurrer to the complaint and in giving judgment for the defendants. The judgment is reversed.

Angellotti, J., Sloss, J., Melvin, J., and Henshaw, J., concurred.

Rehearing denied.

[Crim. No. 1748. In Bank.—January 14, 1913.]

In the Matter of SMITH McMULLIN, on Habeas Corpus.

PARENT AND CHILD—DIVORCE—CUSTODY OF CHILD AWARDED TO MOTHER—LETTERS OF GUARDIANSHIP ISSUED TO MOTHER—DUTY OF FATHER TO SUPPORT.—Under section 196 of the Civil Code, a father is under no duty of supporting his minor child, after a decree of divorce had been obtained against him in another state upon substituted service of summons, which decree awarded the custody of the child to the mother, without requiring him to contribute to its support, and after the mother had sought and obtained letters of guardianship of the child in this state.

ID.—FOREIGN DECREE OF DIVORCE—SUBSTITUTED SERVICE—VOID MONEY JUDGMENT FOR ALIMONY.—A provision in the divorce decree, purporting to direct the husband to pay the sum of one hundred dollars a month to his wife as alimony, is void, for want of jurisdiction of the person of the husband, and cannot be construed as having been intended in part for the support of the child.

APPLICATION for a Writ of Habeas Corpus directed to the Sheriff of Sonoma County.

The facts are stated in the opinion of the court.

C. D. Dorn, and Phil Ware, for Petitioner.

Clarence F. Lea, G. W. Hoyle, J. W. Ford, and L. Horwitz, *Amicus Curiae*, for Respondent.

THE COURT.—Petitioner alleges that he is unlawfully imprisoned by the sheriff of the county of Sonoma by reason of

an order of a committing magistrate holding him to answer for trial in the superior court for an alleged violation of section 270 of the Penal Code, in failing to furnish his minor child, Juanita McMullin, with necessary food, clothing, shelter, and medical attendance. It appears from the evidence taken at the preliminary examination that petitioner and Emma H. McMullin were husband and wife and the parents of Juanita; that Emma H. McMullin went to the state of Nevada, taking with her said child, and thereafter instituted in that state an action for divorce against this petitioner; that he was personally served with summons in the county of Sonoma, state of California, the place of his residence; that petitioner did not appear in said action; that on March 21, 1910, a decree was given and made by the district court of the first judicial district of Nevada, granting a divorce to said Emma H. McMullin from petitioner, awarding her the custody of her two minor children, and ordering the payment to her of one hundred dollars per month by way of alimony; that thereafter, in 1911, Emma H. McMullin returned to the county of Sonoma and took up her residence there; that in April, 1912, she was appointed guardian of the person and estate of said Juanita; that petitioner did not since the divorce provide his daughter with support, maintenance, or education, except that he paid for her tuition at school and did furnish her with a few articles of necessity; that the mother has been supporting said child; and that said Emma H. McMullin has had the custody of her daughter ever since said divorce.

The question presented to us is whether, after a decree of divorce obtained in another state upon substituted service of summons and granting custody of a minor child to the mother, and after she has sought and obtained letters of guardianship of said child in this state, the father is under the duty of supporting such child. Respondent depends largely upon the principles announced in the recent case of *People v. Schlott*, 162 Cal. 348, [122 Pac. 846]. But this case differs in several essential particulars from that. In the Schlott case there was a valid decree of divorce depriving the father of the custody of his child, while requiring him to pay alimony partly for the support of said minor, and it was held that section 196 of the Civil Code had no application to a father who, because

of his own misconduct, had been deprived of the custody of his child but required to pay for the support of said minor. But here, while the decree of divorce had conferred the right to the custody of the minor upon the mother, there had been no order with reference to the payment by the father for the support of his offspring, unless we read such a provision into the decree for the payment of alimony to the plaintiff in that action. Respondent's position is that the amount of alimony (\$100 a month) decreed by the court in Nevada shows that that court must have intended a part thereof for the support of the children (there were two) and that the order itself is tantamount to a declaration that the husband must support the offspring of the marriage. We cannot so interpret that part of the decree adjudging that the defendant must pay alimony to his wife, but even if we could do so we are confronted with the fact that, owing to the substituted service upon defendant of the summons in that action, the part of the judgment requiring the payment of alimony cannot be enforced against petitioner. The court that rendered that judgment never acquired jurisdiction of his person. (Code Civ. Proc., sec. 413; *First Natl. Bank v. Eastman*, 144 Cal. 487, [103 Am. St. Rep. 95, 1 Ann. Cas. 626, 77 Pac. 1043]; *Pennoyer v. Neff*, 95 U. S. 714, [24 L. Ed. 565]; *De la Montanya v. De la Montanya*, 112 Cal. 109, [53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345].) In this case we find the mother at the time of the preliminary examination of petitioner, entitled to the custody of her minor child either by virtue of the decree of the court in Nevada or by reason of the issuance to her of letters of guardianship by a court of competent jurisdiction in California. If she is qualified under the former authority, she is required to support the minor because section 196 of the Civil Code provides that, "The parent entitled to the custody of a child must give him support and education suitable to his circumstances"; and there is no valid adjudication equivalent to an order made under a power similar to that granted by section 139 of our Civil Code, by which the husband is obligated to support his progeny while denied their custody. If we attribute her custody of the children to her letters of guardianship, we must read section 196 in conjunction with section 204 of the Civil Code, which declares that the authority of a parent ceases "upon

the appointment, by a court, of a guardian of the person of a child''; and the same result is reached.

The conclusion therefore is inevitable that neither by force of the Nevada decree, nor by force of the California proceedings in guardianship, had a duty to support the children been cast upon petitioner. The Nevada decree dissolved the marriage *status* and fixed the right of custody of the children with the wife while they remained in Nevada. It could do nothing more. To this extent full faith and credit will be accorded to the Nevada decree. Thus it fell within the power of the wife under supplementary proceedings brought in this state with personal service upon the former husband to have procured, if the facts warranted, an award of the custody of the children, with provision for her own and their support. She did not do this, but resorted to guardianship proceedings, under which, in terms, she was awarded the custody of the persons and estates of the minors. The legal effect, then, of both the Nevada decree and the guardianship decree was to give the mother the custody and control of the children, *without* charging upon the husband their support. Under section 196 of the Civil Code this situation *prima facie* relieves the husband of the duty of support and casts it on the wife. If it be said that it is a reproach to our law that a father be thus permitted to escape the paternal duty of aiding in the support of his minor offspring, the answer is that no such reproach attaches. Our law is adequate, but the obvious steps to be taken and which, if taken, clearly would have fixed the father's duty in this regard, and so made him penally liable for his breach of duty, were disregarded. Instead of resorting to appropriate measures, by proceedings under the Nevada judgment, to straighten the legal tangle which now exonerates the husband from the duty of furnishing such support, resort was had to the criminal court, where the only result of success would be to make it impossible for the husband to earn the money with which he could furnish such support.

The petitioner is discharged.

[S. F. No. 6431. In Bank.—January 14, 1913.]

COUNTY OF KINGS, and HANFORD SCHOOL DISTRICT OF KINGS COUNTY, Petitioners, v. D. BUNN REA, County Auditor of the County of Kings, Respondent.

SCHOOL DISTRICT—BONDS—KIND OF MONEY IN WHICH BONDS ARE TO BE PAID—ORDER OF BOARD OF SUPERVISORS.—There being no specific requirement of the law declaring that bonds of a school district shall be made payable in money of a particular form or kind, a resolution of the trustees of the district, calling an election to determine whether the bonds shall be issued, is sufficient, when it provides for bonds payable in lawful money of the United States, and supports a subsequent order of the board of supervisors directing the issuance of the bonds and making them payable in gold coin of the United States.

ID.—ORDER FIXING TIME FOR INTEREST PAYMENT.—The board of supervisors, after the election authorizing the issuance of such bonds, had power to determine whether the interest thereon should be paid annually or semi-annually, notwithstanding the resolution of the board of trustees and the notice of the election was silent on that subject.

APPLICATION for a Writ of Mandate to compel the respondent, as auditor of the County of Kings, to sign and attest certain bonds and interest coupons attached thereto of the Hanford School District in Kings County issued by the board of supervisors of said county on October 9, 1912. The auditor based his refusal to sign and attest such bonds and coupons on the facts: (1), that the resolution and order of the Board of Trustees of said school district, calling an election to submit to the electors of the school district the question whether such bonds should be issued, failed to provide or specify the kind of money or currency in which said bonds should be paid, and that the board of supervisors of said county, in its resolution and order ordering the bonds issued, provided that they should be paid in United States gold coin; and (2), that the said order of the board of trustees of the school district and the notice of said election failed to provide when the interest on said bonds should be paid, whether annually, semi-annually, or otherwise, and that the said order of

the board of supervisors provided that the interest should be paid annually.

J. L. C. Irwin, for Petitioners.

H. Scott Jacobs, for Respondent.

HENSHAW, J., acting chief justice, delivered the opinion of the court. If those are your two propositions, I speak for the Court in saying that where there is no specific requirement of the law declaring that money of a particular form or kind shall be designated, it is a good bond and it is in full compliance with the law, when it calls for "lawful money of the United States."

And, second, it is clearly a power vested with the supervisors, after election, to determine whether the interest shall be paid semi-annually or annually. If those are your two propositions, they are resolved in favor of petitioner, and mandate will issue accordingly.

[Sac. No. 1955. Department One.—January 15, 1912.]

JOSEPH GORDON, Respondent, v. GEORGE CADWALADER et al., Defendants and Appellants; SOUTHERN PACIFIC RAILROAD COMPANY, Intervener and Respondent.

DEED—RULE IN SHELLEY'S CASE—REMAINDER TO HEIRS OR HEIRS OF BODY.—The so-called rule in Shelley's case is that where a will devises or a deed grants land to A for life, and the remainder after his death to his heirs, or to the heirs of his body, using these words or words having the same legal effect, the effect is to vest in A a fee simple absolute if the remainder is to his "heirs," or a qualified fee, if it is to the "heirs of his body." The heirs of A in such a case take no estate or interest in the land during the life of A, and he may dispose of it as if the deed or will contained no words purporting to transfer to him less than a fee. As it is usually stated, the words "heirs" or "heirs of his body," or whatever other words of like effect are used, are words of limitation and not of purchase.

ID.—FOUNDATION OF RULE IN SHELLEY'S CASE.—The fundamental reason for the rule in Shelley's case is that at common law it was considered that the words "and to his heirs" or "and to the heirs of his body," following a grant purporting to be of an estate for life, necessarily implied that the heirs mentioned should take by inheritance from the life tenant, and not directly by the deed, or directly from the grantor, and as this could not be so unless the life tenant had an estate of inheritance to pass at his death, it followed as a necessary consequence that the deed must be understood to pass the fee to him as well as the life estate.

ID.—RULE ONE OF POSITIVE LAW—INTENT—MEANING OF WORD "HEIRS." In the phrases quoted, when the rule in Shelley's case applies, the word "heirs" is used in the broad sense, to signify the persons who take the estate by succession from generation to generation, forever, or as it is sometimes expressed, the whole inheritable blood of the life tenant, so that such life tenant, and not those who may be his heirs at his death, is the original stock of inheritance. It is a rule of positive law, and defeats even the declared contrary intent if, notwithstanding such declaration, it appears that the word "heirs" was used in this technical sense. But the primary question is always the one whether or not it was so used.

ID.—INTERPRETATION OF GRANT—INTENTION TO CREATE LIFE ESTATE WITH REMAINDER OVER.—If the deed contains words which modify or qualify these phrases to such an extent that a reasonable interpretation of the grant is that the grantor did not use the words to describe the whole line of succession from the life tenant, or his whole inheritable blood, but, on the contrary, intended thereby to point out and designate the particular persons who should take the estate upon the death of the life tenant, and to describe them as the persons then to take the estate direct from the grantor, and by virtue of the grant, constituting of them a new root of inheritance, the implication as to the meaning of said phrases, upon which the rule is founded, would not exist, and the rule would not govern the grant.

ID.—CONSTRUCTION OF DEED—RULE IN SHELLEY'S CASE INAPPLICABLE.—The deed in question, which was executed at a time when the rule in Shelley's case was in force in this state, granted unto the party of the second part "for and during the term of his natural life, and after his death then to descend to his heirs and assigns forever," certain described lands, and recited that "the said land being conveyed to the said . . . for and during his natural life, for the final use, benefit, and behoof of the children, or other lawful heirs of his body, who may survive him." The *habendum* clause was "to have and to hold . . . unto the said party of the second part, his heirs and assigns forever," and a further clause contained a warranty to "the said party of the second part, his heirs and assigns." The final clause stated that the words "for and during the term of

his natural life, and after his death then to descend to," were interlined, and the words "and to" were erased, before the execution of the deed. *Held*, that the deed did not come within the rule in Shelley's case, and that the words used manifested the intent that the grant to the immediate grantee was for life only, and that the remainder was to go to the surviving children or grandchildren, directly by the deed and not by inheritance, and that they, and not such grantee, were to constitute the new stock or root of inheritance of the estate.

ID.—MEANING OF WORDS "DESCEND TO."—The words "descend to," as used in such deed, should be construed as words of transfer, and the passage in which they occur should be read as if it declared that after the death of the immediate grantee the land should "go to" or "vest in" his heirs, the latter words being used as a description of the persons to whom the remainder is transferred, and not to indicate a taking by the law of inheritance.

APPEAL from a judgment of the Superior Court of Yolo County. Nicholas A. Hawkins, Judge.

The facts are stated in the opinion of the court.

George Clark, W. A. Anderson, and Black & Clark, for Appellants.

Hudson Grant, for Plaintiff and Respondent.

William Singer, Jr., Frank Thunen, and D. V. Cowden, for Intervener and Respondent.

SHAW, J.—The defendants' appeal from the judgment was taken within sixty days after its rendition. The evidence is brought up in the record.

The plaintiff sued to quiet title to land. All the parties claim under a certain deed conveying the land, executed by William Gordon to John Gordon on June 3, 1872. The rule in Shelley's case was in force in this state until January 1, 1873, when it was abolished by section 779 of the Civil Code. The said deed was therefore subject to that rule and the sole question is whether or not it comes within the rule. The rule is that where a will devises or a deed grants land to A for life and the remainder after his death to his heirs, or to the heirs of his body, using these words or words having the same legal effect, the effect is to vest in A a fee simple absolute if

the remainder is to his "heirs," or a qualified fee, if it is to the "heirs of his body." The heirs of A in such a case take no estate or interest in the land during the life of A and he may dispose of it as if the deed or will contained no words purporting to transfer to him less than a fee. As it is usually stated, the words "heirs" or "heirs of his body," or whatever other words of like effect are used, "are words of limitation and not of purchase." The plaintiff claims one-sixth of the land as an heir of John Gordon, upon the theory that said deed vested the fee in John. Upon the same theory the intervener claims a part of the land under a conveyance from John in his lifetime. The defendants claim the plaintiff's interest under and by virtue of an execution sale and sheriff's deed upon a judgment against the plaintiff, the sale and deed having been made during the lifetime of John Gordon and upon the theory that said deed to John vested in John a life estate only and vested in Joseph at its date, as one of his six children, a present one-sixth interest in the remainder in the land in fee after the death of John. It will be observed, therefore, that if the rule in Shelley's case controls the effect of the deed of William Gordon to John, thereby vesting the fee in John there would be no interest vested in Joseph at the time of the sale on execution against him and the defendants obtained none thereby.

It is not necessary to state the Gordon deed in full. It names William Gordon as grantor and John Gordon as grantee. The clauses which it is necessary to consider are the granting clause, a recital following the description of land, the *habendum*, the warranty, and the final clause following the attestation clause and explaining an interlineation and erasure. These are as follows:

Granting clause—"Does grant (etc.) unto the said party of the second part for and during the term of his natural life, and after his death then to descend to his heirs and assigns forever."

Recital—"The said land being conveyed to the said John Gordon for and during his natural life, for the final use, benefit and behoof of the children or other lawful heirs of his body, who may survive him."

Habendum—"To have and to hold . . . unto the said party of the second part, his heirs and assigns forever."

Warranty—To . . . “the said party of the second part, his heirs and assigns.”

Final clause—“The words ‘for and during the term of his natural life, and after his death then to descend to,’ interlined, and the words ‘and to,’ erased, before the execution of these presents.”

The final clause evidently refers to changes in the granting clause. It shows that the granting clause was first written thus: “unto the said party of the second part *and to* his heirs and assigns forever,” making an unequivocal grant of the fee, and that when this was perceived and the repugnancy between it and the subsequent recital was noticed, the words “and to” were erased and the words referring to a life estate substituted therefor.

The fundamental reason for the rule in Shelley’s case is that at common law it was considered that the words “and to his heirs,” or “and to the heirs of his body,” following a grant purporting to be of an estate for life, necessarily implied that the heirs mentioned should take by inheritance from the life tenant, and not directly by the deed, or directly from the grantor, and as this could not be so unless the life tenant had an estate of inheritance to pass at his death, it followed as a necessary conclusion that the deed must be understood to pass the fee to him as well as the life estate. In the phrases quoted, when the rule in Shelley’s case applies, the word “heirs” is used in the broad sense, to signify the persons who take the estate by succession from generation to generation, forever, or as it is sometimes expressed, the whole inheritable blood of the life tenant, so that such life tenant, and not those who may be his heirs at his death, is the original stock of inheritance. It is a rule of positive law, and defeats even the declared contrary intent if, notwithstanding such declaration, it appears that the word “heirs” was used in this technical sense. (*Norris v. Hensley*, 27 Cal. 446.) But the primary question is always the one whether or not it was so used.

The rule being founded upon these reasons, it is plain that if the deed contains words which modify or qualify these phrases to such an extent that a reasonable interpretation of the grant is that the grantor did not use the words to describe the whole line of succession from the life tenant, or his whole

inheritable blood, but, on the contrary, intended thereby to point out and designate the particular persons who should take the estate upon the death of the life tenant and to describe them as the persons then to take the estate direct from the grantor and by virtue of the grant, constituting of them a new root of inheritance, the implication as to the meaning of said phrases, upon which the rule is founded, would not exist and the rule would not govern the grant. This distinction is thoroughly established and it is recognized by all the authorities. (2 Washburn on Real Property, secs. 1614, 1615, 1616; 1 Jones on Real Property, sec. 617; 2 Devlin on Real Property, secs. 846a to 846e; 2 Pingree on Real Property, sec. 1019; note to *Carpenter v. Van Olinder*, 11 Am. St. Rep. 102; *Norris v. Hensley*, 27 Cal. 446.) Many illustrations could be given. A few will serve to illustrate the application and effect of the distinction. The words, "and upon his demise to the heirs of *him surviving share and share alike*," show that the word "heirs" was used to describe particular persons and not the line of succession and the rule was held inapplicable. (*Burges v. Thompson*, 13 R. I. 714.) A deed to a husband and wife as joint tenants, for their lives, and to the survivor during the life of the survivor, with remainder to the issue and heirs of their two bodies *and the heirs of such issue forever*, creates only estates for life in the husband and wife and gives to their issue, upon their death, the fee. The addition of the words, "and the heirs of such issue forever," was held sufficient to make the distinction and take the deed out of the rule. (*Montgomery v. Sturdivant*, 41 Cal. 297.) So, also, of the words: "And at her death to be equally divided among her children or legal heirs," (*Hall v. Gradwohl*, 113 Md. 297, [29 L. R. A. (N. S.) 954, 77 Atl. 483]); "To the children and lawful heirs" (*Reilly v. Bristow*, 105 Md. 326, [66 Atl. 262]); "Shall be inherited by the *surviving* issue of my said niece, *share and share alike*," (*Hill v. Giles*, 201 Pa. St. 215, [50 Atl. 758]); "And at her death to the issue of her body *then living*," (*Gladsden v. Desportes*, 39 S. C. 131, [17 S. E. 706]); "Heirs at law and *next of kin*," (*Martling v. Martling*, 55 N. J. Eq. 790, [39 Atl. 203]); "To the heirs of his body begotten if there be any such heirs *him surviving*," (*Granger v. Granger*, 147 Ind. 95, [36 L. R. A. 186, 190, 44 N. E. 189, 46 N. E. 80]); "Heirs of his body *living at the*

time of his death," (*Moore v. Parker*, 34 N. C. 127); "To the heirs of her body *begotten,*" (*Ault v. Hillyard*, 138 Iowa, 242, [115 N. W. 1030]). In these decisions it was conceded that the word "issue," alone, would be considered as the equivalent of "heirs," and would not take the case out of the rule. The words we have italicized were those which were held to have that effect.

The deed here involved contains modifying words of like effect to those above mentioned. The recital and the granting clause are parts of the same sentence and both must be considered in determining the true meaning. The grant as a whole must be understood as if it read: "to John, for and during his natural life, and after his death to the children or other lawful heirs of his body, who may survive him, for their final use, benefit and behoof." The deed was evidently drafted upon a form in common use for a conveyance in fee simple and the granting clause, as it first stood, granted such an estate. The interlineation described John's estate as for his life only, but it would have been ineffectual to escape the rule in *Shelley's* case, if not further qualified. The words added by the recital were manifestly inserted for the purpose of stating the intent more accurately than it was expressed in the first part of the sentence. The recital is therefore the significant part of the deed and it should control the interpretation as far as possible. Under the decisions above cited, it is clear that the word, "children," and the words, "who may survive him," qualifying the phrase, "lawful heirs of his body," and in connection with the declaration that the conveyance is for the "final use, benefit and behoof" of such survivors, were intended and used to show that the grant to John was for his life, only, and that the remainder was to go to the surviving children, or grandchildren, directly by the deed and not by inheritance, and that they, and not John, were to constitute the new stock or root of inheritance of the estate. The use of the expression "who may survive him" or similar terms, shows that the mind of the grantor was directed to the particular persons surviving at the death of John and not to his posterity generally. The words, "or other lawful heirs of his body" make it plain that grandchildren would take, in the event that any of John's children should die before his death and leave children surviving

They were evidently inserted for that purpose, and were not used in the technical sense first above stated.

It is further contended by the respondents that the granting clause itself is devoid of words constituting a grant of the remainder. If the words "descend to" were omitted therefrom, the intent to grant the remainder would be clear, although, under the authorities, in the absence of the recital, the operation of the rule in Shelley's case would override and defeat that intent. (*Norris v. Hensley*, 27 Cal. 446; 2 Devlin on Deeds, 3d ed., secs. 846, 846c.) The clause declares a life estate in John "and after his death then to descend to his heirs and assigns." The word "descend," although literally denoting a passing by inheritance, is often used as a word of transfer. In the connection in which it here occurs, this is its usual signification. (*Doren v. Gillum*, 136 Ind. 139, [35 N. E. 1101]; *Taney v. Fahnley*, 126 Ind. 91, [25 N. E. 882]; *Aydlett v. Swope*, 17 S. W. (Tenn.) 209; *Stratton v. McKinnie*, [62 S. W. (Tenn.) 640]; *Tate v. Townsend*, 61 Miss. 319; *Keim's Appeal*, 125 Pa. St. 487, [17 Atl. 463]; *Halstead v. Hall*, 60 Md. 213; *Dennett v. Dennett*, 40 N. H. 501; *Harrington v. Gibson*, 109 Ky. 752, [60 S. W. 915].) Under these authorities, this passage is to be read as if it declared that after John's death the land should "go to," or "vest in" his heirs, the latter word being used, as before stated, as a description of the persons to whom the remainder is transferred, and not to indicate a taking by the law of inheritance.

The *habendum* and warranty clause are of little importance. They are in the usual form and were evidently printed, if a printed form was used, or copied mechanically, if a form book was used. The incongruity between them and the granting clause, as changed, and as modified by the recital, was apparently not observed when the changes were made, and the failure to change them also may reasonably be attributed to inadvertence.

The conclusion is that the decision of the court below that the deed conveyed the fee to John was erroneous.

The judgment is reversed.

Sloss, J., and Angellotti, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a rehearing of this cause and filed the following opinion on February 15, 1913:

BEATTY, C. J.—I dissent from the order denying a rehearing of this cause, and from the judgment.

In this state the rule in Shelley's case governs the construction of all deeds of conveyance made prior to January 1, 1873. (*Norris v. Hensley*, 27 Cal. 439; *Barnett v. Barnett*, 104 Cal. 298, [37 Pac. 1049].) It is, as to such deeds, a rule of property. I cannot distinguish this case from *Norris v. Hensley* where the terms of a devise were held to bring it within the rule. I think it can be distinguished from *Montgomery v. Sturdivant*, 41 Cal. 297. These are our only authorities. The decisions in other states are conflicting. We should follow our own, however questionable when essential to the protection of vested rights.

[S. F. No. 5670. In Bank.—January 15, 1913.]

M. C. McCLUNG, Respondent, v. PARADISE GOLD MINING COMPANY, Appellant.

MINER'S LIEN—WORK ON MINING CLAIM—CLAIM OF LIEN—NATURE OF WORK.—Under section 1187 of the Code of Civil Procedure, a claim of lien for labor performed on mining property need not state the particular character of the labor done, although in an action to enforce the lien, the claimant must show by his proof that his labor was of such kind as is made lienable by section 1183 of that code, that is, that it was development work or mining by the subtractive process.

Id.—CONTRACT AUTHORIZING WORKING OF MINE—ACCOUNTING OF PROFITS—NOTICE OF INTENTION TO DO WORK.—A contract by a hydraulic mining corporation, whereby it gave a third person an option to purchase a block of its shares, and authorized him to enter upon its mining property and repair the company's flume, and to prospect and examine its mines, accounting to the company for a portion of the gold extracted, is sufficient to put the officers of the corporation on notice that he intended to go to the mine to carry out its objects.

ID.—AGENT OF CORPORATION—DEVELOPMENT WORK ON MINE—WORK BY SUBTRACTIVE PROCESS.—The holder of such option, in performing the work contemplated by the contract on such mining property, was the agent of the owner, within the meaning of the Mechanics' Lien Law, (Code Civ. Proc., sec. 1183), and the work done by him in repairing such flume and in extracting minerals, was "development work," and work by the "subtractive process."

ID.—CONSTRUCTION OF FLUME FOR HYDRAULIC MINE.—The construction of a flume and the bringing of water to a hydraulic mine, for the sole purpose of working it by the only way that it could be worked, is development work.

ID.—ASSIGNMENT OF CLAIMS OF LIEN—ASSIGNMENT PRIOR TO RECORDATION.—Where the claims of liens of persons doing work on such mining property were executed in the individual names of the claimants, and were so recorded, an assignment thereof, although it was executed prior to the recordation of the claims, authorizes the assignee to maintain an action in his own name to foreclose the liens, if by its terms it was not to take effect until after the recordation of the claims.

ID.—ASSIGNEE AGENT OF CLAIMANTS TO RECORD CLAIMS.—Such claimants, after the execution of the assignment, could delegate to the assignee, as their agent, the power to file the claims in their behalf with the county recorder.

APPEAL from a judgment of the Superior Court of Fresno County. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

L. L. Cory, Carrier & Richards, and Canfield & Starbuck, for Appellant.

George Cosgrove, for Respondent.

THE COURT.—This case was decided by the district court of the third appellate district. That court sustained the judgment upon plaintiff's individual claim and that against defendant Lyall, who does not appeal, but reversed the judgment as to those claims assigned to plaintiff. Since we agree with the district court of appeal except as to the last conclusion, we adopt so much of the opinion of that court, written by Mr. Presiding Justice Chipman, as is applicable:

"The action is for the enforcement of laborer's liens against the property of defendant mining company and for

judgment against defendant Lyall. Plaintiff brings the action in his own behalf and as assignee of the claims of eight other persons. The court made findings in favor of plaintiff and entered judgment against defendant Lyall for the sum of \$839.66, with interest from June 25, 1909, and for costs, and adjudged that plaintiff 'have a lien upon the real property hereinafter described for the payment of the sum of six hundred and eighty dollars, together with interest thereon since June 25, 1909, at the rate of 7 per cent', with costs, amounting in all, exclusive of costs, to \$695.50. The usual decree for a sale of the property was made.

"Within sixty days from the entry of judgment, defendant, Paradise Gold Mining Company, appealed from the judgment on bill of exceptions. Defendant Lyall does not appeal. . . .

"The individual claim of plaintiff is . . . to be noticed. His claim states: 'I performed 31½ days labor upon said real property commencing the same May 3d, 1909, and ending June 8th, 1909, under an agreement with Dr. Robert Lyall to pay the sum of \$2.50 per day, or the sum of \$78.25 in all for said labor and there is justly due me on account thereof, the sum of \$78.25, after deducting all just credits and offsets.' The claim then states that defendant corporation is and was at the time the owner and reputed owner of said real property; that defendant Lyall was the person by whom plaintiff was employed 'and said labor was performed as tending giant'; that said Lyall 'is and was, at all times herein mentioned, the person who caused said work to be done who claimed an interest therein, and was and is the agent of the said owner. There was no statement in the claim, in terms, that the labor performed was in the development of any mining claim or work thereon by the subtractive process and it is hence argued that no legitimate inference can be drawn from the facts that plaintiff is entitled to a lien. It was not necessary that the claim should use the language of the statute. The averment was sufficient to warrant proof of just what the labor was and from such proof it was to be determined whether the labor was in development work or mining by the subtractive process. Section 1183 of the Code of Civil Procedure, prescribes the class of persons entitled to the lien and the purpose for which the labor is to be performed in

the case of a mining claim or real property worked as a mine, namely: 'either in the development thereof or in working thereon by the subtractive process.' The preparation of the claim and its recordation are provided for by section 1187. It is there provided: 'Every person . . . within thirty days after the performance of any labor in a mining claim, must file for record . . . a claim containing a statement of his demand . . . with the name of the owner . . . also the name of the person by whom he was employed, . . . with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien,' etc. This section does not require the claimant to state the particular character of his labor although he must show by his proof that it was of such kind as is made lienable by the statute, i. e., development work or mining by the subtractive process. It was held, in *Continental etc. Assoc. v. Hutton*, 144 Cal. 609, [78 Pac. 21], that the Mechanics' Lien Law is part of the Code of Civil Procedure adopted pursuant to the requirements of the constitution. It is remedial in its character and should be liberally construed with a view to effect its objects and promote justice.

"Plaintiff testified that defendant Lyall employed him to work in the mine of defendant company and at the agreed rate of \$2.50 per day and board, and that he worked thirty-one and one-half days. He testified: 'I was employed to do general work about the mine until they worked two shifts with the hydraulic, and after that I ran the giant hydraulic, nights. I did that a week just preceding the time I left.' We think plaintiff's claim of lien was sufficient in form and was supported by the evidence, unless rendered ineffective on other grounds urged against its validity.

"It is contended by appellant that there was no evidence that defendant Lyall was either the actual or constructive agent of appellant or that any portion of the work was done in the development of the mine, or in working thereon by the subtractive process. It appeared that defendant corporation owned the mining property involved and, on April 5, 1909, defendant Lyall had in contemplation the purchase of a large block of the shares of defendant corporation and on that day took an option to that end from the corporation by which he was given authority 'to go in and upon its claims

on Sycamore Creek, near Trimmer, Fresno County' and he was to 'repair the flume for said company as in his best judgment he may think necessary but in any event sufficient to run water for the whole length of it' and he was also to deliver 'to the treasurer of the corporation one-half of all the gold he and his associates and workmen may have secured or taken out of the company's property prior to July 1, 1909.' He was also authorized to 'prospect and examine the same up to July 1, 1909, and to remove the gold therefrom and to keep one-half thereof, paying and delivering the other one-half thereof to' the company. Lyall, shortly after April 5th, went to Selma, in Fresno County, and, as directed by the officers of the corporation, reported to a Mr. Matthews at that place, who was a stockholder in the corporation, for information how to reach the mine. Matthews gave him this information and Lyall reached the mine between April 10th and 20th. He informed Mr. Matthews by letter of his arrival at the mine and this letter was forwarded to the corporation. It appears that the officers of the corporation knew that Lyall was at work at the mine; the contract itself was sufficient to put these officers on notice that Lyall intended to go to the mine to carry out its objects. (*Hines v. Miller*, 122 Cal. 517, [55 Pac. 401].) And later, learning that the men were not getting their pay promptly, the corporation caused the statutory notice of nonliability to be posted at the mine. The men quit work and hence these claims, all of which had already accrued. The work necessary to be done to prospect or work the mine required that the flume referred to in the contract should first be restored and it was over a rough country and a mile long. It was finished and water brought to the mine and the giant started, the mine being a hydraulic proposition. The ground was worked in this way for some time but proved unsatisfactory and Lyall gave up the venture. Without going into the evidence further, of which there was considerable, we think enough appears to show that Lyall was the statutory agent of the corporation as defined in section 1183 of the Code of Civil Procedure. He was there in charge with the consent of the owner and was controlling the mining operations in part at least for the benefit of the owner. (*Higgins v. Carlotta G. M. Co.*, 148 Cal. 700, [113 Am. St. Rep. 344, 84 Pac. 758].) While it is true his primary object was

to prospect the mine, both parties anticipated a possible output of gold and provided for its division by the contract. We think also that the work done may reasonably be said to be development work and it requires no unwarranted construction to treat the work as having in view the operation of the mine by the subtractive process. They did take out some gold but not enough to satisfy Dr. Lyall. In constructing the flume and bringing the water to the mine for the sole purpose of working it, the only way indeed that it could be worked or prospected was, in our opinion, development work."

Discussing the claims upon which plaintiff sued as assignee the district court of appeal said:

"The evidence was that the various claims of lien were prepared and sent to plaintiff at Trimmer Springs, near the mine, where the claimants were assembled; that the assignment, executed by the claimants, purports to assign plaintiff 'all claim or claims, demands against and amounts due from Dr. Robert Lyall and others for work and labor performed upon the property of the Paradise Mining Company, or Paradise Gold Mining Company, together with the claim of lien heretofore filed by each of us against the property of said company and recorded in the office of the county recorder of Fresno County in volumes H and I of liens, at pages variously numbered.' The assignment bears date June 30, 1909, which was subsequent to the date of the recordations of the liens, but the evidence was that the liens were all executed and verified at the time the assignment was executed, which was before the liens were recorded; that, after their execution and after the execution of the assignment they were sent down by the assignee to Fresno to be recorded; that the assignment was made solely for the purpose of collection. Upon the point the court made finding IX that, 'after the due execution of said liens, but before the recordation thereof, all of said persons . . . assigned their said claims of lien to plaintiff but said assignment was made to take effect after the recordation of said claims of lien and not before and was made for collection only and was not an absolute assignment, and the said plaintiff at no time had or claimed ownership of any of said claims filed by the persons other than himself, except for the purposes of collection only.' The plaintiff tes-

tified: 'It was through the consent of all the parties that I got this assignment. I had written to Mr. Cosgrove for information, and as the result he sent up this paper to me. I took it around myself and had the signatures attached to it. . . . I don't know the exact date when it was signed; it was after we stopped work. They were all right there in Trimmer; . . . that was before I filed my lien.' (The liens were all filed June 25, 1909.) He testified that he was 'simply collecting it for these different people. . . . It was before the liens were filed that the assignment was made. I know that because I had part of the liens in my possession at the time. . . . At the time I was getting the liens signed, I got the assignment signed. I know the assignment was signed before the liens were recorded.' The averment of the complaint in each of these assigned claims is that 'said claimant, . . . since the recordation thereof and prior to the filing of the complaint herein, duly assigned the said claim of lien together with all claim and demand against said defendants to this plaintiff.' We have given substantially all the testimony in support of this averment and in support of the finding of the court."

From these facts the district court of appeal determined that there was no evidence to support the finding of the lower court that "the assignment was made to take effect after the recordation of said claims," and that neither by averment in the complaint nor by evidence is the finding that it was "not an absolute assignment" justified further than on the testimony above quoted that it was "made for collection only." With the latter view we agree but it is immaterial for the purposes of this case whether the assignment was absolute or not. The material question is whether or not the assignment took effect only after the filing of the liens. Relying on *Mills v. La Verne Land Co.*, 97 Cal. 254, [33 Am. St. Rep. 168, 32 Pac. 169], in which it was held that a laborer or materialman cannot assign his mere right to assert a lien and clothe the assignee with the power to create final evidence thereof for himself, the district court concluded that since the actual signing and delivering of the assignment occurred before the final step in establishing the liens by filing the notices had taken place, the assignors had attempted to assign the inchoate right considered in the

cited case and that under that authority their act was a nullity. We reach a different conclusion. *Mills v. La Verne Land Company* has been very severely criticised in the opinion in a well considered case in Utah (*Smoot v. Checketts*, 125 Pac. (Utah) 415), but its doctrine has long been the established law in this state. (See, also, *Duncan v. Hawn*, 104 Cal. 14, [37 Pac. 626].) However, the doctrine of that case has never been extended nor amplified. (*People v. Morley*, 17 Cal. App. 469, [120 Pac. 43].) The gist of it is that an assignee cannot file the lien in his own name and that therefore the attempted assignment of the personal right to perfect it is of no value nor effect. The lien has practically no existence for the purposes of assignment until the notice has been duly filed by the lien claimant in his own name. That is all that the case of *Mills v. La Verne Land Company* decides. The physical act of filing the paper may of course be done as well by an agent as by the lien claimant in person. In this case the plaintiff deposited the claims with the proper officer but there was evidence sufficient to show that in so doing he acted as the agent of his associates and to justify the court's findings to the effect that each assignor had filed his own. The assignments in terms operated upon the indebtedness of defendants to the assignors only after the filing of the claim of lien. There was nothing to prevent the claimants from assigning something not yet created in such manner that the assignments should not be effective until the happening of a future event.

If McClung had gone to the county seat carrying the notices of lien and an envelope containing the assignments directed to an agent of the other claimants and if after filing the claims and delivering the envelope said agent had given him the assignments, we think there could be no question of the regularity of the proceeding and the validity of his title; and we see no incongruity in his acting both as agent for the purpose of perfecting the liens and as assignee of them after they should be perfected. Under the text of the assignment it operated neither upon the indebtedness nor the evidence thereof until the due filing and recordation of the latter. We conclude therefore that the superior court's finding in this regard was justified.

The judgment is therefore affirmed.

[Sac. No. 2021. Department One.—January 16, 1913.]

In the Matter of the Estate of GEORGE F. PACKER, Deceased. OLIVE SAMPSON, et al., Contestants and Appellants, v. E. M. GORDON, et al., Proponents and Respondents.

WILL—REVOCATION OF PROBATE—MENTAL INCOMPETENCY—UNDUE INFLUENCE—FRAUD—NONSUIT—EVIDENCE.—In a proceeding to revoke the probate of a will on the grounds of undue influence and fraud, and for the alleged mental incompetency of the testator, in which a motion for nonsuit was granted at the close of the contestant's case, it is held, that the evidence was insufficient to establish either of such grounds of contest, or to warrant the submission of the question to the jury.

ID.—ELEMENTS NECESSARY TO UNDUE INFLUENCE.—Nothing less than pressure so acting on a testator as to destroy his free agency is sufficient to constitute undue influence.

ID.—PRESUMPTION OF UNDUE INFLUENCE—PROVISION FOR PERSON OCCUPYING FIDUCIARY RELATION.—No presumption that a testator was unduly influenced arises from the mere fact that the will makes provision for one occupying a fiduciary relation to him. There must, in addition, be at least a showing that the person so benefited had some part in the making of the will.

ID.—HOSTILITY TO CONTESTANTS.—Conceding that the contestants were entitled to show that the persons charged with exercising undue influence entertained feelings of hostility toward them, such evidence could not have availed to make a case sufficient to go to the jury in the absence of anything tending to prove that undue influence had in fact been exercised.

ID.—MENTAL INCOMPETENCY—TESTATOR OF ADVANCED YEARS—FAILING EYESIGHT.—The fact that a testator was of advanced years and that his eyesight was failing, is not sufficient evidence of mental incompetency to justify setting aside his will.

ID.—UNNATURAL OR UNJUST WILL.—A jury is not authorized to overturn a will merely because its dispositions do not conform to the jurors' notions of justice or propriety. The will in question is held to be neither unnatural nor unjust.

ID.—FAILING MEMORY OF TESTATOR.—Evidence that a testator's memory was somewhat weakened, without any showing of impairment of his ability to grasp salient facts in relation to his property, its situation, and the objects of his bounty is not sufficient proof of want of testamentary capacity.

EVIDENCE—LETTERS USED BY WITNESS TO REFRESH MEMORY—PARTY CALLING WITNESS CANNOT INTRODUCE IN EVIDENCE.—Under section 2047 of the Code of Civil Procedure, a party calling a witness has no right to treat as evidence, by reading, or showing, or handing to the jury, letters written by the witness, and used to refresh the witness' recollection.

ID.—ERROR CURED BY SUBSEQUENT TESTIMONY.—Any error in refusing to permit a witness for the contestants to answer the question whether she had ever heard the wife of the testator say anything to her husband about doing anything for one of the contestants, is rendered harmless, if the witness subsequently testifies that she never heard any such conversation.

APPEAL from a judgment of the Superior Court of Colusa County. H. M. Alberty, Judge.

The facts are stated in the opinion of the court.

Arthur C. Huston, and Seth Millington, for Appellants.

Thomas Rutledge, White, Miller & McLaughlin, and Seymour & Yell, for Respondents.

SLOSS, J.—On February 15, 1910, the superior court of the county of Colusa admitted to probate an instrument purporting to be the last will of George F. Packer. The appellants, children of deceased brothers and sisters of said George F. Packer, filed a petition for revocation of the probate of said will. The grounds upon which revocation was asked were that the document was not executed by George F. Packer in the manner required for the execution of wills; that the decedent was not of sound mind at the time of executing the alleged will and that the execution was induced by undue influence and fraud. The proponents having answered denying the material allegations of the petition with respect to each of these grounds the matter came on for trial before a jury. At the close of the contestants' case the proponents moved for a nonsuit on the ground that no evidence in support of any of the causes of contest had been introduced. The motion was granted and judgment of dismissal entered. The contestants appeal from the judgment.

The alleged will bore date the twenty-seventh day of April, 1907, some two years before Packer's death. By its terms,

the decedent bequeathed five hundred dollars to his niece, Mary Glenning, a like sum to his sister, Jane Packer, a steam harvester to George H. Gordon, and the residue of his estate in equal shares to Edward M. Gordon and the decedent's nephew, Albert M. Packer. George F. Packer was a farmer owning a large ranch and other property in Colusa County, where he had resided for many years. At the date of the will he was of the age of eight-eight years. He was married, but had never had any children. His wife, Hannah Packer, was alive when the instrument in controversy was signed. She died on March 20, 1908, during Packer's lifetime. The only other persons who would, at the date of the will, have been entitled to succeed to his estate as heirs, were his sister, Jane Packer, and children of deceased brothers and sisters, such children including Albert M. Packer and the contestants.

There was no attempt to offer any evidence in support of the averment that the paper had not been executed in due form. Nor does the record contain any evidence tending to show the exercise of undue influence or the commission of fraud. There is a total want of testimony which would justify an inference that any of the beneficiaries, or their wives, or the wife of the decedent (the persons named in the petition for revocation as having exercised undue influence and made fraudulent representations), undertook to influence the testator in any manner whatever. So far as the evidence shows, the will was the product of George F. Packer's free and independent volition. Certainly there is nothing to indicate that he acted under pressure which destroyed his free agency. Nothing less than this is undue influence. (*In re Kaufman*, 117 Cal. 288, [59 Am. St. Rep. 179, 49 Pac. 192]; *Estate of Ricks*, 160 Cal. 459 [117 Pac. 532]; *Estate of Morcel*, 162 Cal. 188, [121 Pac. 733].)

It is argued that there was a confidential relation between the decedent and Albert M. Packer, and that this threw upon the latter, benefiting by the will, the burden of disproving undue influence. But no presumption that the testator was unduly influenced arises from the mere fact that the will makes provision for one occupying a fiduciary relation to him. There must, in addition, be at least a showing that the person so benefited had some part in the making of the will.

(*Estate of Higgins*, 156 Cal. 257, [104 Pac. 6].) The appellants assert in their brief that Albert M. Packer was present when this will was executed. But the record does not bear them out. All that was testified to was that he was in the house when E. M. Gordon entered after the will had been executed. This is clearly insufficient to raise a presumption of undue influence.

Of the issue of fraud nothing more need be said than that evidence to sustain the allegations of the petition is not to be found in the transcript.

The testimony regarding mental incompetency was not such as to have justified the submission of the question to the jury. George F. Packer was a man of advanced years. His sight was failing. But these circumstances alone are not sufficient to justify the court or a jury in setting aside a will. (*Estate of Dole*, 147 Cal. 188, [81 Pac. 534]; *Estate of Motz*, 136 Cal. 558, [69 Pac. 294].) After giving to the contestants the benefit of every favorable interpretation and inference which the testimony can reasonably bear, as we are bound to do on this appeal (*Estate of Arnold*, 147 Cal. 583, [82 Pac. 252]), we are still forced to the conclusion that nothing substantially tending to show a lack of mental capacity to make a will was produced. Stress is laid upon what is called the "unnatural" character of the will. It can hardly be necessary to repeat that a jury is not authorized to overturn a will merely because its dispositions do not conform to the jurors' notions of justice or propriety. "It is well to remember that one has a right to make an unjust will, an unreasonable will, or even a cruel will." (*Estate of McDevitt*, 95 Cal. 33, [30 Pac. 101].) But in fact it cannot truthfully be said that the will before us is either unnatural or unjust. The principal beneficiaries are the persons who were (except for his wife) closest to the testator, who enjoyed his confidence and assisted him in the management of his affairs. One of them, Albert Packer, was his nephew. The other, Edward M. Gordon, had been taken into the testator's family as a mere child, and had lived upon the Packer property, and been treated virtually as a son of George and Hannah Packer all his life. The contesting nephews and nieces did not live near the Packers, and the relations between them and testator were not particularly intimate. Much is

made of the failure of the testator to provide for his wife. This is a somewhat strange criticism, in view of the fact that the wife herself is named in the contest as one of the parties exerting undue influence. But, apart from this, the omission to give anything to the wife is not surprising when we note that she was, at the date of the will, suffering from a disease which was believed to be incurable. Indeed, the appellants themselves, in their petition, allege that at the date of the will she was so afflicted, "and that both she and the said George F. Packer knew that she could not recover."

There was no testimony by either expert witnesses or intimate acquaintances, that in their opinion George F. Packer was not of sound mind. One of appellants' witnesses testified that the decedent's health had been failing for some years, but that his mind, so far as she knew, was strong. One witness, who had worked for Packer as a farm hand, stated that his employer "appeared irrational," but based this statement upon grounds which wholly fail to support the conclusion. One of the circumstances mentioned was that Packer would ask the witness his name and what he was doing, and then, on meeting him another day, would repeat the same questions. Again, that Packer often spoke of things that had occurred many years before, while he was living in Pennsylvania. That the testator would walk around the table where the hired men were eating, and go out without saying anything. Another witness testified that in 1907, he saw Packer set fire to some fox-tails along the road, that he observed that a fence post was on fire, and went to put the fire out, whereupon Mr. Packer said he was old enough to watch his own affairs. At the time of the incident, Packer "appeared" to this witness, too, to be irrational. The facts testified to by the two witnesses just mentioned are too trivial to deserve extended comment. It must be apparent that they can furnish no support for a conclusion that the testator did not possess the mental capacity required for the making of a will. The only circumstance having any bearing on the matter of mental soundness is the repetition of questions that had already been asked and answered. It had a tendency to show that Packer's memory was somewhat weakened. But this, without any showing of impairment of his ability to grasp the salient facts in relation to his property, its

situation, and the objects of his bounty, would not suffice as proof of want of testamentary capacity. (*Estate of Dole*, 147 Cal. 188, [81 Pac. 534].) Taking the case as a whole, it may fairly be said that the evidence in support of the allegation of unsoundness of mind is decidedly weaker than that presented in various cases in which this court has, as matter of law, held the proof offered to have been insufficient.

We think no material error was committed in ruling upon the admission and exclusion of testimony. The appellants offered the deposition of Henria Compton, a niece of decedent. The deposition was taken in June, 1911. In 1909 Mrs. Compton had written letters to relatives, in which she made certain declarations concerning the decedent and other members of his family. The appellants sought to get these letters before the jury upon the plea that they could be used to refresh the recollection of the witnesses. The court declined to permit them to be read. We are satisfied that it was right in so ruling. Even if it be assumed that the circumstances were such as to authorize the use of the letters to refresh the witness' recollection (Code Civ. Proc., sec. 2047), the party calling her was not thereby authorized to put the papers before the jury. Such a paper is "in no sense testimony. . . . The opponent, but not the offering party, has a right to have the jury see it. . . . That the offering party has not the right to treat it as evidence, by reading it or showing it or handing it to the jury, is well established." (1 Wigmore on Evidence, sec. 763.) And such seems to be the fair construction of section 2047 of the Code of Civil Procedure, which expressly declares the right of the *adverse party* to read the writing to the jury. (*Reid v. Reid*, 73 Cal. 206, 208, [14 Pac. 781].) To permit this to be done by the party producing the witness would open the door to the admission of hearsay and manufactured evidence without limit. For like reasons, it was proper to exclude questions in which counsel for appellants, after reading a passage from one of the letters, asked the witness what she meant by the declaration quoted, or based other inquiries upon such passage.

Some other rulings are criticised, but we think none of them, if erroneous, was of sufficient importance to justify a reversal. If it be conceded that appellants were entitled

to show that the persons charged with exercising undue influence entertained feelings of hostility toward the contesting relatives, such evidence could not have availed to make a case sufficient to go to the jury in the absence of anything tending to prove that undue influence had in fact been exercised. Besides, while some questions on this line were excluded, others were permitted to be answered, and the appellants had the benefit of everything of consequence that could have been brought out if the rulings on the earlier questions had been as appellants contend they should have been. Many other questions on this line called for conclusions or opinions, rather than facts, and were properly ruled out for this reason.

The witness Henria Compton was asked whether she had ever heard Hannah Packer "say anything to her husband about doing anything for Jane Packer." An objection was sustained. If the ruling was erroneous (see *Estate of Snowball*, 157 Cal. 301, 309, [107 Pac. 598]) the error was harmless, since it appears that the witness subsequently testified that she had never heard any conversation between George Packer and his wife "in regard to doing anything for Jane Packer."

The appellants urge that the court erred in excluding testimony tending to show that the testator, before and after making his will, had made gifts of property to E. M. Gordon and Albert Packer. We need not pass on the admissibility of this testimony. If it had been admitted, it could not have strengthened the appellants' case to such an extent as to justify the submission of the issue to the jury.

The judgment is affirmed.

Shaw, J., and Angellotti, J., concurred.

[L. A. No. 2743. In Bank.—January 18, 1913.]

SAMUEL BOHN, Respondent, v. JOHN L. BOHN,
Appellant.

PLACE OF TRIAL—CLAIM AND DELIVERY—WAIVER OF RIGHT TO CHANGE

Although a defendant has, under section 395 of the Code of Civil Procedure, the absolute right to have an action in claim and delivery of personal property tried in the county where he resided at the time it was brought, still he may waive such right, and he does waive it unless he follows the procedure for asserting it.

ID.—PROCEDURE FOR CHANGE—MOTION AND ORDER FOR CHANGE ESSEN-

TIAL.—The procedure for the assertion of such right is not regulated solely by section 396 of that code, but by section 397 also, which requires a motion to be made by the defendant for a change of the place of trial to the county of his residence, in addition to the demand and affidavit of merits, as one of the necessary steps in the procedure to obtain the order of transfer. The change can be effected only through such order.

ID.—NOTICE OF MOTION ESSENTIAL—TIME OF HEARING MOTION MUST BE

STATED.—The motion for an order of transfer must be made upon notice to the plaintiff. Such notice must be in writing and conform to the requirements of section 1010 of the Code of Civil Procedure, and must contain, *inter alia*, a statement of the time when the motion would be made or brought on for a hearing. The absence of such a statement renders the notice fatally defective, and necessitates a denial of the motion. The rule for liberal construction, embodied in section 396 of that code, does not excuse a failure to observe such requirement.

ID.—APPEARANCE IN OPPOSITION TO MOTION—WAIVER OF NOTICE—LIM-

ITED APPEARANCE.—The appearance of the plaintiff in opposition to the motion for transfer, for the limited purpose of objecting to its consideration upon the ground of the insufficiency of notice, did not constitute a waiver of a proper notice.

ID.—POSTPONEMENT OF HEARING—GIVING NEW NOTICE—FAILURE OF

DEFENDANT TO REQUEST.—Where the notice of motion for a change of the place of trial is so defective, it would have been proper for the trial court, at the request of the defendant, to defer a determination of the motion to enable the defendant to give a proper notice. In the absence of such a request, a denial of the motion, without giving the defendant an opportunity to give a proper notice, cannot be objected to by the defendant on an appeal from the order of denial.

ID.—ORDER REFUSING CHANGE—APPEAL.—An order denying a motion for a change of the place of trial is itself appealable, and its correctness cannot be reviewed on an appeal from the judgment.

ID.—RULE OF COURT FIXING REGULAR MOTION DAYS.—A rule of court establishing regular days for the hearing of motions, cannot be construed to dispense with the notice which the code declares shall be given to authorize the court to hear a motion.

DISTRICT COURT OF APPEAL—REFUSAL OF TRANSFER TO SUPREME COURT —EFFECT ON OPINION OF APPELLATE COURT.—An order of the supreme court, refusing to transfer a cause to that court after judgment in the district court of appeal, does not adopt the opinion of the appellate court so as to give it, in the supreme court, the authoritative effect which one of its own decisions would have.

ID.—DETERMINATION OF CAUSE BY SUPREME COURT—CONTRARY CONCLUSION REACHED BY APPELLATE COURT.—The supreme court will determine a cause pending before it in accordance with its legal conviction, notwithstanding in a case between the same parties presenting identical questions a contrary conclusion was reached by the district court of appeal, and a transfer of such case to the supreme court, after the judgment of the appellate court, was denied by the supreme court.

APPEAL from a judgment of the Superior Court of Orange County and from an order refusing to change the place of trial. Z. B. West, Judge.

The facts are stated in the opinion of the court.

Winslow P. Hyatt, for Appellant.

Williams & Rutan, for Respondent.

SLOSS, J.—A hearing in Bank was ordered after judgment in Department. Upon the former submission, the following opinion, prepared by Lorigan, J., was filed:

“This action is in claim and delivery and was brought in the superior court of Orange County.

“Defendant being served, filed a demurrer to the complaint on April 22, 1910, and on the same day filed and served on the attorneys for plaintiff an affidavit of merits and a demand that the action be transferred for trial to the superior court of Los Angeles County, on the ground that at the time of the commencement of the action defendant was a resident

of the city and county of Los Angeles. At the same time he filed and served the following motion, entitled in the court and cause: "Now comes . . . the defendant . . . and moves this Hon. court to transfer the above entitled action . . . to the superior court of Los Angeles County, upon the ground (setting it forth as above). Said motion will be based on the pleadings and papers on file herein and the affidavit and demand of the defendant herewith served and filed."

"On the filing of these papers the clerk of the court placed said motion on the regular law and motion calendar of said court for Friday, April 29, 1910. On that date defendant presented his motion for transfer of the cause, and plaintiff objected to the granting thereof on the ground that the notice of motion was insufficient in that no time of hearing was designated in said notice of motion, and on the further ground that no sufficient service of notice of motion had been given. In support of the last ground, an affidavit of one of the attorneys for plaintiff was filed, showing that when service of the above papers were made on which the motion for a transfer was based, the attorneys for plaintiff and the attorney for defendant resided and had their offices in Orange and Los Angeles County respectively.

"The court heard said motion, the above papers and no others being used on the hearing thereof, and then and there entered an order denying said motion for a transfer of said cause, to which ruling and order the defendant excepted.

"Subsequently the demurrer to the complaint was sustained and plaintiff filed an amended complaint. The time stipulated within which defendant might answer having expired and no answer being filed, his default was entered and judgment given for plaintiff for the recovery of the property or its value and damages.

"Defendant appeals from the judgment, the appeal being based on the judgment-roll, accompanied by a bill of exceptions, under which (and this is the only question presented) the validity of the order denying the motion for transfer of the cause is attacked.

"Several sections of the Code of Civil Procedure are to be considered in determining this question.

“Section 395 thereof provides as to actions of the character brought here, that ‘the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action.’ Section 396 provides that ‘if the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county.’

“The claim of appellant is that, under the first section referred to, an absolute right is given a defendant to have the action brought against him tried in the county where he resided when it was commenced, and that, under section 396, all that is necessary to be done by a defendant to secure that right is to serve and file the affidavit and demand that the trial be had in the proper county as provided in the section; that no motion as such, or notice of motion, is necessary or provided for; that the demand is all the notice that is required to bring it on for hearing, where the court has established regular law and motion days, as was the case in Orange County. We state these points as appellant makes them.

“Undoubtedly, as he claims, a defendant has the absolute right to have the action brought against him tried in the county where he resided at the time it was brought. But this pertains to the right, not to the remedy by which it may be secured. While an absolute right, if it is insisted on, it is one which a defendant may waive, and which he does waive unless he follows the procedure provided for asserting it. This procedure, however, is not regulated solely by section 396, but by section 397, also, which provides, among other things, that “the court may, on motion, change the place of trial in the following cases: 1. When the county designated in the complaint is not the proper county.” Under the position which appellant takes, he necessarily denies, and consistently so, the application of this latter section, contending that his rights are to be measured by the terms of section 396 alone. But it is quite obvious, on a little reflection, that this cannot be so. Our attention has not been called by counsel on either side to any decision directly involving this point. Our own research discloses numbers of decisions on appeal

where the validity of orders granting or refusing a transfer were involved, but the point considered was generally the sufficiency of the demand or affidavit of merits, a motion and notice of hearing thereof being given, as is the practice.

“That this is the proper and required procedure, we think quite plain.

“The demand and affidavit which are required to be filed under section 396 are not addressed to the court, nor do they, of themselves, by virtue of such filing, call for or require any action by the court. They advise the plaintiff that the right of transfer shall be insisted on, and their service and filing are the initial steps required to be taken as between the parties to secure that transfer. The filing of the demand and affidavit do not operate *ipso facto* to change the place of trial. They have no such force. The change can only be effected through an order of the court after its judicial action has been invoked, by bringing the matter on for hearing, where the right of the defendant to the transfer can be contested by the plaintiff. The court must be applied to for an order of transfer. Such application is a motion (Code Civ. Proc., sec. 1003), and under section 397, a motion for the change must be made in addition to the demand and affidavit, as one of the necessary steps in the procedure to obtain the order of transfer.

“Having determined that a motion is necessary, we now come to the question of notice and its character. It is, of course, beyond question that where a motion is required to be made for an order in a cause whereby the right of an adverse litigant may be affected, it must be upon notice to such party.

“Now as to the character of the notice necessary to be given to authorize a court to entertain a motion. This is clearly shown by section 1010 of the Code of Civil Procedure, as follows: “Notices must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based.”

“In the present matter, if the formal motion which appellant served on the attorneys for plaintiff be treated as a notice of motion, it was radically defective as such in the very essential particular that it did not state any time when the

motion would be made or brought on for hearing, and for that reason the motion for a change of the place of trial was properly denied.

“In this view, we do not deem it necessary to consider the objection urged by respondent at the hearing below and insisted on here, of insufficiency of service of the notice to warrant a hearing on the day when appellant presented his notice. Nor is it necessary to particularly discuss the claim made by appellant based on the existence of the rule of the superior court of Orange County respecting law and motion days. Rules of court have usually to do with the conduct and orderly dispatch of the business of the court and cannot control or be substituted for statutory provisions as to procedure. The rule relied on by appellant simply provides when the court will take up for consideration motions of the contemplated presentation of which proper notice has been given. It could not, and of course does not, pretend to dispense with the notice which the code declares shall be given to authorize it to hear a motion.

“Appellant suggests that as the provisions of section 396 are remedial, a liberal construction in favor of the remedy should prevail. It would, if there was any room for such a construction, but there is not. The rule of liberal construction may not be applied to excuse a failure to adopt the rules of necessary procedure under which alone the remedy may be invoked.

“The judgment and order appealed from are affirmed.”

Our further examination of the case has led us to the conclusion that the Department opinion was correct. The principal reason for granting a hearing in Bank was that, in a case between the same parties, presenting precisely the same issues of fact and law, the district court of appeal for the second appellate district had reversed an order like the one here appealed from, and that a petition to have the appeal transferred to this court for hearing and determination had been denied. (*Bohn v. Bohn*, 16 Cal. App. 179, [116 Pac. 568].) It is, of course, much to be regretted that opposite rulings should be made in two cases which present identical questions. But an order by this court, refusing to transfer a cause after judgment in the district court of appeal, does not adopt the opinion of the appellate court so as to give it,

in this court, the authoritative effect which one of our own decisions would have. Being now convinced that the order appealed from should be affirmed, we must so declare, even though this view necessarily involves the conclusion that the earlier appeal should have been transferred to this court, and thereupon disposed of by a judgment differing from that rendered in the district court of appeal. Indeed, believing, as we do, that the order now under review was properly made, it would be our duty to affirm it, even if this court had itself, in another case, reversed an order similar in all respects.

One or two further observations concerning the disposition of the former appeal may properly be made. The justices of the district court of appeal did not agree upon the reasons for reversing the order appealed from. Two of them based their conclusion upon the ground that a written notice of intention to move is not required in the case of an application to change the place of trial to the proper county. This position is, we think, fully met in the foregoing Department opinion. The third justice held that the conduct of plaintiff's counsel in appearing to oppose the granting of the application was a waiver of notice. There are several decisions to the effect that want of proper notice of a motion is waived where the opposing party appears and contests the motion. (*McLeran v. Shartzer*, 5 Cal. 70, [63 Am. Dec. 84]; *Reynolds v. Harris*, 14 Cal. 667, [76 Am. Dec. 459]; *Acock v. Halsey*, 90 Cal. 215, [27 Pac. 193]; *Herman v. Santee*, 103 Cal. 519, [42 Am. St. Rep. 145, 37 Pac. 509].) "Where the object of notice was accomplished," said the court in *McLeran v. Shartzer*, 5 Cal. 70, [63 Am. Dec. 84], "it is immaterial whether there was notice or not." But in all the cases in which this rule was applied the party entitled to notice had appeared and contested the motion on the merits. His position was analogous to that of a defendant who, although not regularly served with summons, files an answer, or does any other act amounting to a general appearance. Under such circumstances, any defect in the service of process is waived. Here, however, the plaintiff made no opposition to the motion except to object to its consideration upon the ground of the insufficiency of notice. The affidavit presented by him had reference to this objection alone. His attitude is to be compared to that of a defendant appearing specially

to question the court's jurisdiction of his person. It is difficult to see how a defendant can be held to have waived a valid objection when he has done no more than to insist upon it in the only manner that is open to him. Where the appearance in opposition to a motion is for this limited purpose, it does not constitute a waiver. (28 Cyc. 8; *Curtis v. Walling*, 2 Idaho, 416, [18 Pac. 54]; *Wood v. Critchfield*, 1 Dowl. 587.)

It is suggested that, if sufficient notice had not been given, the court below should not have denied the application for change of venue, but should have deferred action to enable the defendant to give a proper notice. This would, no doubt, have been a proper course, if the defendant had requested it. But, instead of so requesting, he persisted, in the face of the objection of want of notice, in presenting his motion. No doubt he then took the position which he now advances, viz., that no notice was required. Under these conditions, he cannot claim that the court erred in passing upon the motion which he had thus pressed upon it for determination. It may be, too, that a denial of the motion for want of notice would not be a bar to a subsequent motion upon proper notice. But the question of defendant's right, if seasonably asserted, to renew his motion, is not involved here.

The Department opinion states that the appeal is from the judgment. It omits to mention, except inferentially, that there is also an appeal from the order denying a change of place of trial. Since the latter order is itself appealable (Code Civ. Proc., sec. 939), its correctness cannot be reviewed on the appeal from the judgment. (Code Civ. Proc., sec. 956.) Under the views herein expressed, both the judgment and the order will have to be affirmed, the former because the points raised cannot be considered on appeal from the judgment; the latter because there is no merit in said points.

The judgment and the order appealed from are affirmed.

Angellotti, J., Shaw, J., Lorigan, J., Melvin, J., and Henshaw, J., concurred.

[S. F. 6201. Department Two.—January 20, 1913.]

In the Matter of the Estate of J. ALEXANDER YOELL,
Deceased.

In the Matter of the Application of Emily C. Yoell for a
Family Allowance. EMILY C. YOELL, Petitioner and
Respondent, v. EVALINE A. LEVY, Special Adminis-
trator, etc., Contestant and Appellant.

FRAUD—NECESSITY OF PLEADING.—Fraud is not presumed, and whenever it constitutes an element of a cause of action which is of an affirmative nature or is invoked as conferring a right, it must be alleged.

ESTATE OF DECEASED PERSON—FAMILY ALLOWANCE TO WIFE—SEPARATION AGREEMENT—FRAUD OF HUSBAND NOT PLEADED.—Where a wife, who had been living separate and apart from her husband, up to the time of his death, under written articles of separation, applies for a family allowance from his estate, and at the time of filing her petition therefor had knowledge of fraudulent acts of her husband which would nullify the effect of such separation articles as a bar to her receiving such allowance, it was incumbent upon her to have pleaded the fraud. In the absence of such pleading, the agreement remained unimpeached for fraud before the trial court on the application for the allowance, and the rights of the parties were to be adjudicated in accordance with its legal terms and effect.

ID.—SEPARATION AGREEMENT AS DEFENSE TO CLAIM FOR ALLOWANCE—EVIDENCE TO SHOW AND REBUT FRAUD—NECESSITY OF FINDINGS—REVIEW ON APPEAL.—On such an application, in which the personal representative of the estate sets up the separation agreement as a defense, if it be assumed that the petitioner had the right, under the implied replication allowed by section 462 of the Code of Civil Procedure, to give evidence of the fraud, the representative of the estate would have the right, by way of implied rejoinder, to prove estoppel, a failure to rescind, laches, the statute of limitations, or any other matter of defense. On the new issues so raised, the trial court must make specific findings one way or the other, before a judgment can be entered for an allowance, and before such matters can be reviewed upon appeal.

ID.—HUSBAND AND WIFE—SEPARATION AGREEMENTS NOT AGAINST PUBLIC POLICY.—Notwithstanding the confidential relations which exist between husband and wife, separation agreements, providing for the division of all the community property of the parties, and obligating each of them not to assert any claim against the estate of the other, are not against public policy, and may be entered into and

will be enforced in accordance with their terms when undue advantage has not been taken of either spouse.

ID.—WAIVER OF RIGHT TO FAMILY ALLOWANCE—NO MINOR CHILDREN AT TIME OF APPLICATION.—A wife may, by the terms of a separation agreement, waive her right to receive a family allowance from the estate of her husband, notwithstanding there were minor children at the time the agreement was executed, if such children had ceased to be minors at the time her application for an allowance was made.

ID.—PROVISION FOR DEEDS FROM AND TO SPOUSES—INVALID TRUST TO CONVEY LAND—ESTOPPEL TO ASSERT INVALIDITY OF AGREEMENT.—Where the separation agreement provided, as a mode of establishing title to the real property divided by the spouses, that deeds should be made by them to a third person, who in turn should make to them the deeds contemplated by the agreement, they are estopped to assert the invalidity of the agreement on the ground that it created a void trust to convey land, if they assented to the deeds so made to them, acted under them, and maintained actions in the court to enforce them.

ID.—INVALIDITY OF MEANS TO CARRY OUT VALID CONTRACT.—The provision for deeds to and from such third person was a mere means for carrying into effect the principal purposes of the agreement, but was not an integral nor an essential part of it, and after such method was executed and accepted by both parties, the entire contract, in itself valid, will not be permitted to fall because of the supposed invalidity attaching to the means adopted.

ID.—RIGHT TO FAMILY ALLOWANCE—CONDITIONS ESSENTIAL TO RIGHT. Upon the death of the husband the surviving wife may receive a family allowance when and only when she is a member of the family and receiving or entitled to receive support as such member, and when, even though a member of the family, she has not parted with or relinquished her right to make demand for such allowance.

ID.—WAIVER OF RIGHT TO ALLOWANCE—RENUNCIATION OF CLAIM AS HEIR AND AS SURVIVING WIFE.—A provision in a separation agreement, by the terms of which the wife renounced and waived all claim which she has or may have against her husband's estate as heir of the husband or as his *surviving wife*, is a relinquishment of her right to a family allowance, notwithstanding such right was not renounced *eo nomine*.

ID.—WIFE CEASING TO BE MEMBER OF HUSBAND'S FAMILY—WANT OF RIGHT TO SUPPORT.—A wife who has voluntarily and deliberately severed her relationship as a member of her husband's family, and whose right to support by him does not rest upon the family relationship, but upon the terms of articles of separation, is not entitled to a family allowance from his estate.

Id.—PROBATE COURT MAY CONSTRUE AND ENFORCE SEPARATION AGREEMENT.—The court in probate, on an application by the surviving wife for a family allowance from her husband's estate, has equitable jurisdiction to pass upon the effect and validity of a separation agreement, which has been interposed as a defense by way of estoppel to her claim.

APPEAL from an order of the Superior Court of the City and County of San Francisco awarding a surviving wife a family allowance from the estate of her deceased husband. Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

Carl Westerfeld, and Sullivan & Sullivan, and Theo. J. Roche, for Appellant.

J. L. Taugher, for Respondent.

HENSHAW, J.—J. Alexander Yoell died in July, 1904. In 1909 his widow, Emily C. Yoell, petitioned for a family allowance. Her petition was opposed by the special administratrix, but the court, after hearing, awarded a family allowance in the sum of one hundred dollars a month, dating from the death of the husband. From this order the appeal under consideration is taken.

As ground of opposition the special administratrix set up a post-nuptial agreement between the deceased and his wife, with appropriate averments, to the effect that it had been faithfully carried out according to its tenor and terms by the deceased during his lifetime, and with further allegations tending to show upon the part of Emily C. Yoell, respondent herein, a full acceptance of all of the benefits and considerations moving to her under the agreement. Thus, it is alleged that during the lifetime of the parties, Emily C. Yoell sold certain real property which, under the articles of separation, became hers, subject to a life estate in the husband, and caused her grantee to begin a suit to quiet his title to the property so conveyed, which action resulted in a decree so doing, in confirmation of the terms of the articles of separation. The validity of the articles of separation it is further alleged was established in another action brought by the husband against

the wife and others, which action was to settle conflicting claims to certain of the real estate disposed of under the article of separation, and which action resulted in a valid and subsisting decree establishing the title to the property in accordance with the terms of the articles of separation. Again, it is alleged that after the death of J. Alexander Yoell, his wife, this respondent, took appropriate proceedings in certain of the superior courts of the state to have decrees entered declaring the termination of the life estate of her husband in the property, and vesting the fee thereof, untrammelled by the life estate, in her, all in accordance with the terms of the articles of separation, and that decrees to this effect in favor of the widow were duly given and made. .

Under these pleadings, thus sufficiently indicated, the matter came on for hearing. The court found that immediately after the execution of the separation agreement Yoell and his wife separated as husband and wife by mutual consent and continued to live apart until the death of the husband; that the husband paid to his wife continuously during many years and up to the time of his death three hundred and fifty dollars a month, as called for by the articles of separation. Then by finding XII the court declared: "That there is no covenant, term or condition in the said separation agreement which deprives Emily C. Yoell of the right to a family allowance during the progress of the administration of the said estate and that she is entitled to such allowance to be paid to her out of the said estate, notwithstanding such separation agreement or anything done thereunder or in pursuance thereof." Thus the award of the family allowance was made. The evidence disclosed that J. Alexander Yoell and his wife Emily C. Yoell had been married for thirty-five years and that to them seven children had been born, when differences arose between them culminating in an action for divorce brought by the wife against the husband. A reconciliation was effected, the action was dismissed, but within a year harmony was once more destroyed, the wife left the home and began a second action for divorce in April, 1898. This action was never tried and in fact was finally dismissed. Negotiations were opened looking to an adjustment of their differences without divorce, and articles of separation were entered into. It appears that throughout Mrs. Yoell was fully

cognizant of the nature, character, and value of her husband's properties, besides which, as to those values and as to the terms of the agreement of separation, she had acted upon the advice of her counsel, an attorney at law. The articles of separation, as formulated, agreed upon, and executed, described the husband as the party of the first part, the wife as party of the second part, and proceeded as follows:

"Whereas, unhappily there exist marital differences between the said parties of the first and second parts, which, in their opinion, render it impossible that they can longer live together as man and wife, and in consequence thereof they have agreed to live separate and apart from each other, and,

"Whereas, it is the desire of said party of the first part to make a permanent provision to the party of the second part, and it is the desire of both parties hereto that all of the property rights of the parties of the first and second parts respectively, shall be finally adjusted, settled and determined:

"It is now mutually agreed and understood as follows:

I.

"That the parties hereto have agreed and do now agree to an immediate separation as husband and wife and do now agree to live for the future separate and apart from each other."

The agreement then made provision to the effect that the real property of the community (and all of the property of the husband was community property) should be divided in moieties, the husband and the wife each taking an undivided half of the fee of each piece or parcel, but that the husband should have a life estate in the one-half so conveyed to the wife, and in lieu of the income which otherwise the wife would derive from her property, the husband was to pay her three hundred and fifty dollars per month, the explanation of this being that it was thought the husband could better manage the properties by having control over them all, and that three hundred and fifty dollars per month represented the full net rental value of the undivided one-half. Next (so proceeds the agreement) it is declared that: "The true intent and meaning of this agreement is that upon the death of the said party of the first part, the said party of the second part shall be entitled to the full, entire, undivided one-half of said four described pieces and parcels of land, in fee simple." And

“it is further covenanted and agreed . . . that the execution of this agreement and the consummation thereof by the execution and delivery of said various instruments shall be and is intended to be a full, complete and final adjustment of all the property rights of the parties hereto, and that neither party hereto shall or will at any time hereafter make or attempt to make any other or further claim than as herein stipulated. That the property stipulated to be conveyed shall be and remain forever the separate property of each of the parties hereto and neither of the parties hereto will claim as against the other or as against their heirs or legal representatives or otherwise, the increase in value of the undivided one-half of any of said property or make or advance any claim that any portion thereof is community property.

“It is further covenanted and agreed that either of the parties hereto shall have an immediate right to devise or bequeath by will their respective interests in the property belonging to each other under the provisions of this agreement; and that the devisees and legatees under any such will shall and may have the same privileges and rights as the respective testators may have had or exercised.

“It is further expressly covenanted and agreed that neither party hereto will in any way or manner contest or oppose the probate of the other's will, whether heretofore or hereafter made, or interfere with the other, their heirs or assigns, in the exercise of the rights of property herein stipulated and agreed to; that neither of them will at any time hereafter assert any right, interest, or title as heirs at law of the other to any property devised or bequeathed by such will, or as against the estate of the other, should the other die intestate and all claim as such heir, or as surviving husband and wife, respectively, and all right to contest or oppose the last will of the other is hereby expressly waived, together with all right to administer or to apply for letters of administration, or letters of administration with the will annexed, upon the estate of the other.”

It has been pointed out that the court's award of a family allowance was based upon its legal construction of the tenor and effect of these articles of separation, the court stating this legal conclusion as a finding of fact that the articles contained no covenant, term, or condition depriving Emily C. Yoell

of the right to a family allowance. In addition this respondent insists that the agreement is void or voidable or nonenforceable by reason of the fraud practiced upon Emily C. Yoell by her husband in the very procurement of the execution of the articles of agreement and in his conduct subsequent thereto. Of the nature of this fraud it is unnecessary here to say more than that under the views of respondent's counsel, it was so comprehensive and apprehensive in its perfidiousness that it would have excited the envious admiration of Machiavelli. To this appellant, protesting that the matter may not here be considered, makes answer that no fraud is shown in anywise vitiating the agreement, that no fraud is shown in anywise justifying the respondent in the repudiation of the agreement, that the asserted fraud was fully known to the respondent shortly after the execution of the agreement, and that after this knowledge she reaffirmed it in every possible particular, both by failure to rescind, by accepting all the benefits conferred upon her by it, by the invocation of judicial process and judicial decree establishing her rights under it, by the submission and assent to like judicial decrees brought to establish the validity of it by her husband, and finally, by the petition and assertion of her rights under it after her husband's death in terminating the life estate and securing to herself the untrammelled fee of the properties, so that, finally, by estoppel, by laches, and by the statute of limitations she is forever debarred from asserting its invalidity.

These matters have thus been indicated because of the emphasis placed upon them in respondent's brief, necessitating a reply in kind from appellant. But into the consideration of them, for the following reasons, we may not and will not enter. Respondent's petition for an allowance for family support made no mention of the articles of separation. It did not disclose their existence. Still less did it disclose a desire upon the part of the petitioner to have them set aside and declared null and void upon the ground of fraud. It is fundamental that fraud is not presumed, and whenever it constitutes an element of a cause of action which is of an affirmative nature or is invoked as conferring a right, it must be alleged. (*Wetherly v. Straus*, 93 Cal. 283, [28 Pac. 1045]; *Burriss v. Adams*, 96 Cal. 664, [31 Pac. 565]; *Burris v. Kennedy*, 108 Cal. 333, [41 Pac. 458]; *Estate of Vance*, 141 Cal.

627, [75 Pac. 323].) If, therefore, petitioner, who at the time she signed her petition had full knowledge of all of these matters, believed that the existence of the articles of separation stood as an obstacle in the way of her receiving a family allowance, and that that obstacle was removable for fraud, she should so have pleaded. Not having so pleaded, the result is that the agreement stood before the trial court unimpeached for fraud, and the rights of the parties were left to be adjudicated in accordance with its legal terms and effect. Thus, if petitioner believed that, notwithstanding the terms of the separation agreement, she was still entitled to the family allowance, this was a position tenable under her pleading, since it called only for a legal construction of the agreement, and under that legal construction she would or would not be entitled to the allowance. This seems to have been the view taken by the judge in probate, who held that nothing in the agreement debarred her from the right to the family allowance.

And, from another point of view, no different result is reached if it be said that the petitioner was not obliged to anticipate a reliance by the administratrix upon the terms of the separation agreement, and that therefore when, in the answer and opposition of the administratrix the agreement was set forth, the petitioner was allowed the implied replication of section 462 of the Code of Civil Procedure. Assuming that under such an implied replication, evidence of fraud might be given, (*Moore v. Copp*, 119 Cal. 433, [51 Pac. 630]), it necessarily follows that by the same implication of law there is given to the defendant (in this case the administratrix in opposition) an implied rejoinder, under which she may prove estoppel, a failure to rescind, laches, the statute of limitations or any other matter of defense. But assuming that all these new issues may thus be injected into the case without pleading, nevertheless it follows that before a judgment can be entered under such circumstances and before these matters can be reviewed upon appeal, the court must have made specific findings one way or the other thereon. This the court did not do and so, as has been said, from this point of view, the matters are not open to consideration on this appeal.

There is left then for consideration only the legal questions which group themselves under these heads: 1. Is the agreement itself legal and binding upon the parties; 2. Does the agreement itself bar petitioner of a right to a family allowance (a) under its very terms, or (b) by virtue of the fact that by conduct under it she ceased to be a member of the deceased's family; and 3. Has the court in probate jurisdiction to give effect to such an agreement, if it finds it to be valid?

1. Upon the first proposition, notwithstanding the confidential relations which exist between husband and wife, it may not be disputed that such agreements are not against public policy, and may be entered into and will be enforced in accordance with their terms when undue advantage has not been taken of either spouse. We need not go outside of the decisions of our own state for the complete establishment of this, though it may be added that the decisions of other states are in harmony therewith. (*In re Noah*, 73 Cal. 583, [2 Am. St. Rep. 829, 15 Pac. 287]; *Wickersham v. Comerford*, 96 Cal. 433, [31 Pac. 358]; *In re Davis*, 106 Cal. 453, [39 Pac. 756]; *Fealey v. Fealey*, 104 Cal. 354, [43 Am. St. Rep. 111, 38 Pac. 49]; *Estate of Winslow*, 121 Cal. 92, [53 Pac. 362]; *Hite v. Mercantile Trust Co.*, 156 Cal. 765, [106 Pac. 102]; *Estate of Edelman*, 148 Cal. 233, [113 Am. St. Rep. 231, 82 Pac. 962].) In this case the evidence is undisputed, as above set forth, that the division of the property was advisedly entered into by Mrs. Yoell, she thoroughly understanding the condition of her husband's affairs, the values of the properties, the incomes which they returned, and having throughout the negotiations and to their consummation the advice of her own attorney and counsellor at law. Further, as has been indicated, it is shown that in numerous, and indeed in all ways Mrs. Yoell accepted the benefits of the agreement and that the husband fully performed his part thereof, faithfully paying the three hundred and fifty dollars per month as contemplated. This continued through many years, and therefore no question can here arise of the fairness of the transactions between the parties. To the argument of respondent that at the time these articles of agreement were entered into there were minor children whose rights upon the estate of their father could not be contracted away by the

mother, the answer is that this is very true, but the question of the limitation of the power of the parties to contract in this regard arises only when it is shown that the rights of minor children are presently involved. At the time of the death of J. Alexander Yoell there were no minor children. A family allowance under our law is given only for the support of the widow or of the widow and minor children or of the minor children. Where there are no minor children, then the family allowance is for the widow alone, and as is said in the well considered case of *Rieger v. Schaible*, 81 Neb. 33, [16 Ann. Cas. 700, 17 L. R. A. (N. S.) 866, 115 N. W. 560]. "The rule seems to be that a widow may by appropriate and sweeping provisions of an ante-nuptial contract (and so of course of a post-nuptial contract) waive her right to an allowance when the rights of minor children are not involved." In the present case it is for herself alone that the widow makes application for the allowance.

The separation agreement provided, as a mode of establishing title and separate estate in the undivided moieties of the real property, that deeds by Yoell and his wife should be made to one Buckbee, who in turn should make to the Yoells the deeds contemplated by the agreement. It is said that here was a void trust to convey, rendering the whole agreement void. But to this it must be answered, first, that this was not an executory trust, but an executed one. Buckbee made the deeds, both parties assented to them, received the benefits of them, acted under them, sought the courts to enforce their validity, and so both, upon the simplest principles of equitable estoppel, will be forbidden, while retaining the benefits, to question the validity of the agreement under which they received them. (*Los Angeles v. Los Angeles City Bank*, 100 Cal. 24, [34 Pac. 510]; *Pixley v. Western Pac. R. R. Co.*, 33 Cal. 183, [91 Am. Dec. 623]; *Burris v. Adams*, 96 Cal. 668, [31 Pac. 565]). And, finally, upon this point it may be said that the provision for deeds to and from Buckbee was a mere means of carrying into effect the principal purposes of the agreement. It was not an integral nor an essential part of it. The method provided was executed and accepted by both parties, and the whole contract in itself valid will not be permitted to fall because of the supposed invalidity attaching to the

means adopted. (*Estate of Heywood*, 148 Cal. 194, [82 Pac. 755]; *Lauricella v. Lauricella*, 161 Cal. 61, [118 Pac. 430].)

This disposes of the imperfections asserted to exist in the agreement itself which respondent insists are of such gravity as to destroy the instrument. We pass, then, to the second consideration.

2. It has been pointed out that the separation agreement made complete disposition of the property of the spouses, dividing it equally between them; that the contemplated separation was a permanent one, and the disposition of the property was designed and declared to be final and complete. A complete release and relinquishment of all rights, present and prospective, is indicated, first, by the general scope and intent of the instrument, and second, by the following language: "the execution of this agreement and the consummation thereof . . . shall be and is intended to be a full, complete and final adjustment of all the property rights of the parties hereto, and that neither party shall or will at any time hereafter make, or attempt to make, any other or further claim than as herein stipulated. That the property stipulated to be conveyed shall be and remain forever the separate property of each of the parties hereto.

"It is further expressly covenanted and agreed that neither party will . . . interfere with the other, their heirs or assigns, in the exercise of the rights of property herein stipulated and agreed to; and that neither of them will, at any time hereafter, assert *any right, interest or title as heirs at law of the other*, to any property devised or bequeathed by such will or as against the estate of the other, should the other die intestate, and *all claim as such heir, or as surviving husband and wife respectively*, and all right to contest or oppose the last will of the other is *hereby expressly waived*."

Upon the death of the husband the surviving wife may receive a family allowance when and only when she is a member of the family and receiving or entitled to receive support as such member, and when, even though a member of the family, she has not parted with or relinquished her right to make demand for such allowance. (a) To establish such relinquishment of right, no more apt words could be chosen than those deliberately employed in the agreement under consideration. True, it does not in terms and by name relinquish

the right to a family allowance, but it does more than this. The wife covenants that she has renounced and waived all claim which she has or may have as *heir* of the husband or as his *surviving wife*. It is only as heir and surviving wife that she could make her demand for a family allowance, a demand which she has solemnly renounced. In the leading case in this state upon the subject, *In re Noah*, 73 Cal. 583, [2 Am. St. Rep. 829, 15 Pac. 287], under the articles of separation the husband was to pay and did pay to the wife \$10,500, the contract providing that the \$10,500 should be in full satisfaction of "all her marital claims," etc. This was held to be a relinquishment upon the part of the wife of her right to family allowance. In *Wickersham v. Comerford*, 96 Cal. 433, [31 Pac. 358], the wife having received an allotted sum under the agreement of separation, which provided that she "relinquish all right as his wife in law or equity or by descent and each party shall have hereafter no claim upon the other for support or sustenance," it was held that the agreement was binding upon the parties and deprived the wife of the right thereafter to select a homestead out of the husband's separate property either during his life or after his death. In this case *Eproson v. Wheat*, 53 Cal. 715, is distinguished, it being pointed out that in the latter case, "the wife relinquished no right to property and the setting apart to her of a homestead after his (the husband's) death was not in contravention of any express or implied term of the agreement." In somewhat different form the question arose in *In re Davis*, 106 Cal. 453, [39 Pac. 756], where the spouses "relinquish all claims of every nature upon the property of each other then owned or thereafter to be acquired and to immediately separate and live apart from each other during their natural lives," the wife stipulating as to certain moneys to be paid her "that she will receive the same in full satisfaction of all claims she may have as the wife of said W. W. Davis on any property he now has or may in any manner acquire; and hereby does relinquish and surrender forever all claims of any nature she may now or hereafter have against any property that said W. W. Davis may now or may hereafter in any manner acquire." The wife applied for letters of administration upon the estate of her husband, the right to such letters depending upon the relative's right to succeed

to the personal estate or some portion thereof. It was held that the articles of agreement worked the disinheritance of the wife and she was therefor not entitled to letters, this court saying: "Of course she remains the widow, since the parties could not by their contract change their matrimonial *status*; but it was perfectly competent for them to alter their legal relations as to their property, and this they accomplished. The wife contracted away her inheritable interest in her husband's property, and with that right went the right to administer." In *Estate of Winslow*, 121 Cal. 92, [53 Pac. 362], the agreement provided that it should operate "as a complete settlement and adjustment of all their property rights, relations and affairs." There was property affected by a homestead. The husband paid to the wife one-half of the agreed valuation of this homestead property. The spouses lived apart up to the time of the husband's death. There were no children. The widow petitioned the court that the homestead property should be set aside to her, claiming that the homestead had never been abandoned, and that she was entitled to the same as the survivor of the marital community. The court in probate granted the application, and its order was reversed upon appeal, this court pointing out that it was declared that the agreement should operate as a complete settlement and adjustment of all their property rights, relations, and affairs; that it was executed and that it operated as an abandonment of the homestead. Elsewhere, language not so strong as that contained in this agreement has been held to bar the widow under similar applications. Thus in *Kroell v. Kroell*, 219 Ill. 105, [4 Ann. Cas. 801, 76 N. E. 63], by terms of an ante-nuptial contract, each party released, conveyed, and quitclaimed to the other "all interest in the property of the other, both real and personal, renouncing forever all claims, in law and equity, of curtesy, dower, homestead and survivorship." It was contended by counsel for the widow that these terms of the contract did not embrace the widow's award, to which she was therefore entitled on application. But the court said: "The right to a widow's award, under the statute, depends upon marriage, the continuance of the marriage relation until death, and the survivorship of the wife. The contract included all rights acquired by either one of the parties to it who should outlive the other, in the prop-

erty or estate of the other, and clearly embraced the widow's award." In *Appeal of Staub*, 66 Conn. 127, [33 Atl. 615], where the wife in an ante-nuptial agreement received a certain sum "in lieu of dower and all other rights and interests and claims which she would but for the agreement have had in the estate covenanted to receive this money 'in lieu and as full payment for her dower right and of all other claims and interest she otherwise would have had in his estate,' " this language was held to bar her right to the statutory allowance during the settlement of the estate. To the same effect are *Appeal of Cowles*, 74 Conn. 24, [49 Atl. 195]; *Paine v. Hollister*, 139 Mass. 144, [29 N. E. 541]; *Tiernan v. Binns*, 92 Pa. St. 248; *Buffington v. Buffington*, 151 Ind. 200, [51 N. E. 328]; *Young v. Hicks*, 92 N. Y. 234; *Johnston v. Spicer*, 107 N. Y. 191, [13 N. E. 753]; *Pavlicek v. Roessler*, 222 Ill. 83, [78 N. E. 11]; *Brown v. Brown's Admr.*, (Ky.), 80 S. W. 470; *In re Deller*, 141 Wis. 255, [25 L. R. A. (N. S.) 751, 124 N. W. 278].

Of the cases in this state which respondent contends support the contrary view, *Eproson v. Wheat*, has already been considered and shown not to be in point. In *In re Vance*, 100 Cal. 425, [34 Pac. 1087], no separation agreement was under consideration. The same is true of *In re Bump*, 152 Cal. 274, [92 Pac. 643]. *Warner v. Warner*, 144 Cal. 615, [78 Pac. 24], did not involve the consideration of a separation agreement, but of an ante-nuptial agreement by which the wife "does hereby relinquish and disclaim any and all right, claim and interest in and to the property of said first party (the plaintiff) either as heir or otherwise." It was held that a declaration of homestead which the wife placed upon the separate property of the husband was not in violation of the terms of this agreement. Construing it the court said that it was an agreement upon the part of the wife "not to seek to deprive him of any of his property or to assert any claim thereto adverse to him during his lifetime, or any claim of inheritance therein after his death. Her declaration of homestead was not a violation of this obligation thus assumed by her." It is concluded, therefore, that by the very language of the separation agreement the wife renounced, surrendered, and released her right to make application for a family allowance.

(b) The wife, however, was not entitled to succeed in her application, by reason of the fact that she had voluntarily and deliberately severed her relationship as a member of the husband's family. The separation agreement, as we have said, makes plain that such is her intent, while the proved facts of her conduct after the execution of these papers, including the fact, that though in the same city with the husband at the time of his death, she did not even attend his funeral, emphasize the absolute severance of all family ties. (*In re Noah*, 73 Cal. 583, [2 Am. St. Rep. 829, 15 Pac. 287]; *Wickersham v. Comerford*, 96 Cal. 433, [31 Pac. 358]; *Estate of Miller*, 158 Cal. 420, [111 Pac. 255].) In *Bose v. Bose*, 158 Cal. 428, [111 Pac. 258], it is held that under the statutes pertaining to a homestead and making provision for maintenance and support of the family, setting aside estates of small value, and property exempt from execution, the widow, to take, must come within the definition of the "family," must have been a member thereof "or at least must, without fault of her own, have been entitled to maintenance and support from the husband during his lifetime." This language of course means that she must have been entitled to support as a member of his family. In the case at bar the agreement being valid the widow had voluntarily severed her connection with the family, and her right to support did not rest upon the family relationship at all, but upon the terms of the articles of separation.

3. Finally, respondent contends that the court in probate may not consider the separation agreement; that the widow is entitled to all rights in and to the estate of her husband until, in an action in equity, the court has entered its decree specifically enforcing the contract against the widow. *Bridge v. Kedon*, 163 Cal. 493, [126 Pac. 149] is cited as authority in support of this view. The position is not sound, nor is it supported by the case mentioned. Of course, during the lives of the parties a court of equity would be the forum for the enforcement of any violated rights conferred by the agreement. But here the agreement has been fully executed, and one of the parties to it is dead. The other is making unwarranted claims in probate upon the estate of the deceased, and his representative interposes this agreement as a defense by way of estoppel to those claims. That the probate court has

equitable jurisdiction for the purpose of passing upon the validity and effect of such agreements, our cases not only recognize, but declare. *In re Noah*, 73 Cal. 583, [2 Am. St. Rep. 829, 15 Pac. 287], and *Estate of Garcelon*, 104 Cal. 570, [43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414], are typical, while in *Estate of Edelman*, 148 Cal. 233, [113 Am. St. Rep. 231, 82 Pac. 962], discussing the bar of such an agreement, it is said: "While it is true that the law was unable to, and therefore did not, give effect to such transfers, releases, or extinguishments of heirship, it is equally true that they were always cognizable in equity, and that in proper cases they afforded a complete defense by way of estoppel. And this equitable defense by way of estoppel is cognizable by the court in probate."

The order appealed from is therefore reversed.

Melvin, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[Sac. No. 1912. In Bank.—January 20, 1913.]

ANGELLA GARDELLA, Respondent, v. COUNTY OF AMADOR (a Municipal Corporation), and COUNTY OF CALAVERAS (a Municipal Corporation), Appellants.

TOLL-BRIDGE—EXPIRATION OF LIFE OF FRANCHISE TO COLLECT TOLLS—BRIDGE BECOMES FREE PUBLIC HIGHWAY.—Upon the expiration of the twenty-year period limited by the act of March, 1862 (Stats. 1862, p. 76), authorizing the construction of a bridge across the Mokelumne River at Big Bend, situated partly in Calaveras County and partly in Amador County, and granting the right to collect tolls thereon for twenty years, the right to collect tolls ceased by limitation, and the bridge so constructed became a free public highway. This result would have followed even in the absence of any statute to that effect.

ID.—DEDICATION OF TOLL-ROAD OR BRIDGE TO PUBLIC USE—TERMINATION OF RIGHT TO TAKE TOLLS.—The construction of a road upon the grant of a franchise to collect tolls is a dedication of the road to public use, subject only to the right to collect tolls. The road

belongs to the public, and the only interest of the holder of the franchise is the right to collect tolls as a compensation for building the road, and there is no right to compensation when the right to take tolls has ceased by expiration of the term for which it was granted or by abandonment. The same rules apply to bridges, which are highways under section 2618 of the Political Code.

ID.—BRIDGES SITUATED IN TWO COUNTIES.—Section 2619 of the Political Code, providing that “whenever the franchise for any toll-bridge . . . has expired by limitation or nonuser, such bridge . . . becomes a free public highway,” is not limited in its application to bridges or roads wholly within a single county.

ID.—CERTIORARI—ANNULING ORDER OF SUPERVISORS DECLARING BRIDGE A PUBLIC BRIDGE.—A judgment in *certiorari* proceedings annulling, for want of jurisdiction to make it, an order of the board of supervisors declaring such bridge to be a free public bridge, which order had been passed after the expiration of the period limited for the collection of tolls, was not an adjudication that the bridge had not become a free public highway upon the expiration of that period.

ID.—FRANCHISE TO COLLECT TOLLS ON PUBLIC HIGHWAY—LIMITATION ON POWER OF SUPERVISORS—BRIDGE ACROSS WATERS SEPARATING TWO COUNTIES.—A board of supervisors has no power to grant a franchise to collect tolls on a bridge constituting a free public highway, except in the case authorized by subdivision 33 of section 4041 of the Political Code, when in their judgment the expense necessary to operate or maintain it as such is too great to justify the county in so operating or maintaining it. That subdivision, however, is limited to the case of bridges situated entirely in a single county, and has no application to the case of bridges across waters separating two counties.

ID.—CONSTRUCTION OF NEW TOLL-BRIDGE—STATUTORY REQUIREMENTS MUST BE FOLLOWED.—The board of supervisors of the county situated on the left bank of a river dividing two counties has no power, under section 2843 of the Political Code, to grant the right to construct a new toll-bridge across such river, except upon compliance with the various requirements made necessary by sections 2870 and 2872 of that code.

ID.—GENERAL POWERS OF SUPERVISORS—CONSTRUCTION OF NEW TOLL-BRIDGE—COLLECTING TOLLS ON EXISTING PUBLIC HIGHWAY.—The boards of supervisors of the counties bordering upon such river, are not authorized, under their general powers, to enter into a contract for the construction of a new toll-bridge, for with respect to that subject the legislature, by sections 2843 et seq. of the Political Code, has made specific provisions limiting both the extent of the power and the mode of its exercise; nor can the power to grant a franchise to collect tolls upon an existing public and open bridge be

implied from any general expression in the code defining their powers, because, in the absence of statute expressly granting it, they have no power to authorize the taking of tolls upon a public highway.

ID.—ESTOPPEL AS AGAINST PUBLIC—INVALID FRANCHISE FOR TOLL-BRIDGE.

The doctrine of estoppel cannot be applied so as to validate, as against the public, grants of franchises to collect tolls upon a bridge constituting a public highway, made by boards of supervisors in excess of the powers conferred upon them.

APPEAL from a judgment of the Superior Court of Calaveras County. A. I. McSorley, Judge.

The facts are stated in the opinion of the court.

Wm. G. Snyder, District Attorney of Amador County, and Will A. Dower, for Appellants.

F. J. Solinsky, and Paul C. Morf, for Respondent.

SLOSS, J.—The defendants appeal from a judgment in favor of plaintiff.

The action was brought to quiet plaintiff's title to a bridge called "The Big Bar Bridge" crossing the Mokelumne River, and to quiet title to a portion of the road leading to the bridge at either end. At Big Bar, where the bridge crosses, the thread of the Mokelumne River forms the boundary between Amador and Calaveras counties. The latter county is on the left bank of the river. The plaintiff claims under two ordinances passed by the supervisors of Calaveras and Amador counties, on the fourth and fifth days of April, 1898, respectively, purporting to grant to her a franchise permitting her, for the period of thirty years, to collect tolls from the public traveling upon said roads and over said bridge. The counties defendant assert, on the other hand, that the bridge, with its approaches, is a free public highway, and that the alleged franchises to collect tolls are void.

In March, 1862, the legislature passed an act (Stats. 1862, p. 76) granting to Louis Soher and his associates the right to construct a bridge at Big Bar, with a road crossing said bridge from Mokelumne Hill in Calaveras County to Butte in Amador County, and to collect thereon for twenty years such tolls as might annually be fixed by the board of super-

visors of Calaveras County. The bridge was constructed and tolls collected by Soher & Co. until in October, 1885, the supervisors of Calaveras County passed an order declaring the bridge to be a free public bridge, and the road leading thereto in said county a free public highway. In February, 1886, Soher & Co. filed a petition in the superior court of Calaveras County for a writ of *certiorari* to review such order, and the proceeding resulted in a judgment declaring the action of the board to be in excess of its jurisdiction, and annulling the order complained of. No appeal was ever taken from this judgment.

In July, 1886, the board of supervisors of Calaveras County granted to Soher & Co. a license to collect tolls on the bridge until the first Monday in October of the same year. Thereafter the rights of Soher & Co., whatever they were, became vested by transfers in Joseph Gardella, who died in 1891. The plaintiff and her four children succeeded to his interest.

After October, 1886, no license was granted, but the supervisors continued from year to year to fix the tolls to be collected by the successors of Soher & Co.

In April, 1898, the plaintiff filed with the board of supervisors of Calaveras County a petition praying for a franchise to collect tolls on the Big Bar Bridge for thirty years. The petition averred that it was necessary to repair the bridge and replace a large portion thereof with a combination iron bridge; that the expense of reconstruction would be about four thousand dollars. The petitioner alleged her willingness to reconstruct the bridge and to keep it in repair during the term of such franchise. A similar petition was presented to the supervisors of Amador County. The orders granting the franchises were adopted, as already stated, on the fourth and fifth days of April, 1898. In neither case did the order of the board, or its records, contain, by way of recital, or otherwise, a finding or declaration that in the judgment of the board "the expense necessary to operate or maintain" the bridge was "too great to justify the county in so operating or maintaining" it. (Pol. Code, sec. 4041, subd. 33.) The court, however, admitted, over the objection of the defendants, parol testimony tending to show that the respective boards did make a determination of this fact.

Thereafter, Mrs. Gardella repaired and reconstructed the bridge and its approaches, expending thereon some eight thousand dollars, and she has ever since, until the present controversy arose, made all necessary repairs, and has collected tolls at the rates fixed, from time to time, by the supervisors of Calaveras County.

In this state of facts, the bridge unquestionably was, when the orders of the fourth and fifth days of April, 1898, were made, a free public highway, and not, as declared in one of the conclusions of law, a toll-bridge, with respect to which the plaintiff was the owner of a valid franchise. By the act of 1862, under which the bridge was originally constructed, the right to collect tolls was granted for the period of twenty years. Upon the expiration of that period, the right ceased by limitation. (Pol. Code, sec. 2619; *People v. Anderson etc. Co.*, 76 Cal. 190, [18 Pac. 308]; *People v. Davidson*, 79 Cal. 166, [20 Pac. 538]; *Blood v. Woods*, 95 Cal. 78, 86, [30 Pac. 129]; *People v. Auburn etc. Turnpike Co.*, 122 Cal. 335, [55 Pac. 10].) The construction of the road upon the grant of a franchise to collect tolls is a dedication of the road to public use, subject only to the right to collect tolls. (*Blood v. Woods*, 95 Cal. 78, [30 Pac. 129].) The road belongs to the public, and the only interest of the holder of the franchise is the right to collect tolls as a compensation for building the road. (*Wood v. Truckee Turnpike Co.*, 24 Cal. 475; *Kellett v. Clayton*, 99 Cal. 210, [33 Pac. 885].) There is no right to compensation when the right to take tolls has ceased by expiration of the term for which it was granted or by abandonment. (*McMullin v. Leitch*, 83 Cal. 239, [23 Pac. 294].) The same rule applies to bridges (*Sears v. Tuolumne County*, 132 Cal. 167, [64 Pac. 270]), which are highways under the definition of the statute. (Pol. Code, sec. 2618.)

It is argued that section 2619 of the Political Code, providing that "whenever the franchise for any toll-bridge, trail, turnpike, plank, or common wagon-road has expired by limitation or nonuser, such bridge . . . becomes a free public highway," applies only to bridges or roads wholly within a single county. The section was relied upon in *Blood v. Woods*, 95 Cal. 78, [30 Pac. 129], where the road in question extended from one county into another. But, if we were to disregard the code section, the result would be the same. In the ab-

sence of any statute, a toll-road, upon the expiration of the time for which the franchise to take tolls was granted, would become a free public highway. (*People v. Davidson*, 79 Cal. 166 [21 Pac. 538].)

It is claimed, however, that the judgment in the *certiorari* proceeding brought by Soher & Co. in 1886 was an adjudication that the bridge was not a free public highway, and that this adjudication, whether erroneous or not, has become final and conclusive. We think the judgment had no such effect. "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." (Code Civ. Proc., sec. 1911; *Fulton v. Hanlow*, 20 Cal. 456; *Chapman v. Hughes*, 134 Cal. 641, [58 Pac. 298, 60 Pac. 974, 66 Pac. 982].) All that was adjudged in the judgment in *certiorari* was that the board of supervisors had no jurisdiction to make an order declaring the bridge to be a free public highway. The want of such jurisdiction may have rested on any one of a variety of grounds. Certainly the ownership by Soher & Co. of a franchise to collect tolls was not a necessary part of the adjudication.

If, then, the bridge in question was, on the fourth and fifth days of April, 1898, a free public highway, there was no power, unless by virtue of subdivision 33 of section 4041 of the Political Code, to grant a franchise to take tolls thereon. This subdivision is, in effect, a re-enactment of a provision which appeared for the first time in subdivision 41 of section 25 of the "Act to establish a uniform system of county and township governments, approved March 24, 1893. (Stats. 1893, pp. 346, 359.) Prior to the enactment of this statute, no franchise to collect tolls upon a public highway could be granted at all. (*El Dorado County v. Davison*, 30 Cal. 520.) As was said in the case last cited, where the board of supervisors had undertaken to grant such a franchise to the defendant: "A toll-gate erected upon a highway which belongs to the state or the people thereof is a nuisance, and might be abated as such. The grant to the defendant was to do an illegal act."

Since 1893, however, boards of supervisors have had power to grant franchises for taking tolls on public highways, "when

in their judgment the expense necessary to operate or maintain such public roads or highways as free public highways is too great to justify the county in so operating or maintaining them." (*Blood v. McCarty*, 112 Cal. 561, [44 Pac. 1025].) In the present action the court made a finding to the effect that the board of supervisors of each of the counties of Calaveras and Amador did, before granting the franchises of April fourth and fifth, 1898, make a determination that the expense of maintaining and operating the bridge was too great to justify the respective counties in so maintaining and operating it. This finding is attacked by appellants, their position being that the determination in question, which is prerequisite to the validity of the order (*Bedell v. Scott*, 126 Cal. 675, [59 Pac. 210]), must appear affirmatively upon the record of the board, and, if not so appearing, cannot be proven otherwise. The records of the respective boards do not, as already stated, show such determination. While the point thus urged finds some support in the case last cited, the weight of authority seems to be to the effect that parol evidence is admissible to show that a court or board of limited power has acted within its jurisdiction, in the absence of a statute requiring such facts to appear in the minutes or other record of its proceedings. (*Jolley v. Foltz*, 34 Cal. 321; *Reclamation Dist. v. Goldman*, 65 Cal. 638, [4 Pac. 676]; *In re Williams*, 102 Cal. 70, 77, [41 Am. St. Rep. 163, 36 Pac. 407]; *Freeman on Judgments*, 4th ed., sec. 523; *Black on Judgments*, sec. 282.) But it is unnecessary to decide this question here. The respondent herself suggests, and we think correctly, that subdivision 33 of section 4041 has no application to the case of a bridge across waters separating two counties. In *Croley v. California Pac. R. R. Co.*, 134 Cal. 557, [66 Pac. 860], the court held that subdivision 4 of section 25 of the County Government Act (Stats. 1891, p. 300), giving the supervisors power to erect bridges, but providing that when the cost of erection of any bridge exceeds the sum of five hundred dollars, the board must advertise for bids, etc., had no bearing upon the authority of the board to contract for the construction of a bridge crossing a stream which separated two counties. It was pointed out that as the authority of the board was limited to the construction of bridges "within the county," the construction of a bridge, only one-half of which

would be in the county, was not included in the grant of power or controlled by the limitations upon such grant. "It is also evident," says the court, "that neither county would have the right to construct a bridge beyond its own boundary line and there is no provision in the subdivision for any concert of action between the boards of two counties or for harmonizing any difference between them, if such should exist." The reasoning applies with equal force to the case before us. By the introductory words of section 4041, the supervisors are vested with enumerated powers "in their respective counties." A bridge across a river dividing two counties is an entirety. In the nature of things it calls for unity of control. This is illustrated by the code sections authorizing the construction of toll-bridges over waters dividing two counties (Pol. Code, secs. 2843 et seq.). By these provisions the grant of the right to construct, the fixing of license-taxes and tolls, and all details of regulation, are placed in the jurisdiction of the supervisors of the county on the left bank of the stream or other water. That no similar provision is found in the general enactment (Pol. Code, sec. 4041, subd. 33) authorizing the grant of a right to take tolls upon a public highway is persuasive evidence that the subdivision was not designed to include the case of a bridge over waters dividing two counties. It was certainly never contemplated that the board of supervisors of the county in which one-half of such bridge was located should have authority to grant a franchise to take tolls over such half, while the remainder of the bridge might be free and open. Here, as in the case of the construction of a new bridge (the case considered in *Croley v. California Pac. R. R. Co.*, 134 Cal. 557, [66 Pac. 860]), there is no provision for concerted action between the two counties. The reasonable interpretation of subdivision 33 of section 4041 is that the section, if it covers the case of a bridge at all, has reference only to bridges situated entirely within the limits of a county.

The respondent urges, however, that the transaction of April, 1898, may be viewed in another aspect. The claim is that what was offered by plaintiff in her petition, and subsequently carried out by her, was, in effect, the construction of a new bridge in return for the grant of a right to take tolls thereon. As has already been suggested, authority to so con-

struct a toll-bridge may be granted by the board of supervisors of the county situated on the left bank of the river (Pol. Code, sec. 2843). But such grant may be made only upon compliance with various requirements, such as the publication of a notice of the intended application (Pol. Code, sec. 2870). The applicant must also cause a certified copy of the order granting the application, with the application, to be recorded in the office of the county clerk before "proceeding under it." (Pol. Code, sec. 2872.) It is not claimed that there was any compliance with these provisions, and the grant to plaintiff cannot, therefore, be sustained under the power conferred upon the board of supervisors by the sections just cited.

There is no force in the contention that the proceedings constituted a contract, which the respective boards of supervisors were authorized to make with plaintiff under their general powers. In *Croley v. California Pac. R. R. Co.*, 134 Cal. 557, [66 Pac. 860], it was held that section 2713 of the Political Code gave to the supervisors of the counties bordering upon streams plenary powers in the matter of the construction of bridges crossing such streams, to such extent as to permit the county to agree to pay to a railroad corporation constructing such bridge a given sum in return for the furnishing, on the bridge, of a separate roadway for teams and pedestrians. The decision is based upon the ground that there is no legislation limiting the power of the board in the matter "nor upon the extent or mode in which it is to be exercised." But, obviously, this reasoning has no application to the grant of a franchise to construct a toll-bridge, for with respect to this subject the legislature has made specific provision, limiting both the extent of the power, and the mode of its exercise. (Pol. Code, secs. 2843 et seq.) On the other hand, if this be regarded, not as the construction of a new bridge, but as the grant of a franchise to take tolls upon an existing public and open bridge, the power to grant such franchise cannot be implied from any general expression in the statute defining the powers of boards of supervisors (*Blood v. Woods*, 95 Cal. 78, [30 Pac. 129]), since, as we have seen, there is, in the absence of statute expressly granting it, no power to authorize the taking of tolls upon a public

highway. (*El Dorado County v. Davison*, 30 Cal. 520, *Blood v. Woods*, 95 Cal. 78, [30 Pac. 129].)

Finally, it is argued that the counties, having received the benefits of plaintiff's expenditures, are estopped to deny the validity of the franchise forming the consideration of such expenditures. But the doctrine of estoppel cannot, we think, be applied so as to validate, as against the public, grants in excess of the limited powers conferred upon the public agents who assumed to make them. If there be any estoppel in cases of this character, its effect must be limited to permitting the plaintiff to retain what she has received (*Sacramento County v. Southern Pacific Co.*, 127 Cal. 217, [59 Pac. 568, 825]), or to recover the reasonable value of what she has conferred upon the defendants in reliance upon their action. To grant further relief, such as that sought in this action, would obliterate the distinction between powers conferred upon public officers or boards and those expressly withheld from them. The mere assumption of a power would, if acted upon to his cost by a third person, be equivalent to the exercise of a power actually possessed.

The judgment is reversed.

Angellotti, J., Shaw, J., Melvin, J., and Henshaw, J., concurred.

Rehearing denied.

[S. F. No. 5733. In Bank.—January 20, 1913.]

JOSEPH A. PRITCHARD, as Administrator of the Estate of Albert D. Shepard, Deceased, Appellant, v. THE WHITNEY ESTATE COMPANY, Respondent.

EMPLOYER AND EMPLOYEE—SECTION 1970 OF CIVIL CODE—AMENDMENT OF 1907—CONSTITUTIONAL LAW—TITLE OF ACT—SUITS AGAINST EMPLOYER.—The act of 1907 amending section 1970 of the Civil Code (Stats. 1907, p. 119), the title of which reads "An act to amend section 1970 of the Civil Code of the state of California, relating to the responsibility of employers for injuries to or death of employees," is not in conflict with section 24 of article IV of

the constitution, requiring that every act shall embrace but one subject, which subject must be expressed in its title. The general subject expressed in the title of the act authorizes the inclusion of provisions declaring who may sue the employer for damages resulting from such death. Such details need not be expressed in the title.

ID.—UNIFORM OPERATION OF ACT—GRANT OF SPECIAL PRIVILEGES.—The fact that the act gives a right of action for damages against an employer in favor of the widow, children, dependent parents, and dependent brothers and sisters of an employee whose death is caused by an injury received from negligence of a fellow-servant, and does not grant such right in favor of the husband, nephews and nieces, or other collateral heirs of the person so killed, does not render the act violative of the constitutional provisions (Const., art. I, secs. 11, 21), requiring general laws to have uniform operation, and forbidding a grant of special privileges to one citizen or class which are not given on the same terms to all.

ID.—RIGHT OF HEIRS TO SUE FOR INJURY TO ANCESTOR—RIGHT CREATED BY STATUTE.—A right of action to an heir for an injury to an ancestor does not exist at common law, and is not an inherent right. It exists only so far and in favor of such persons as the legislature may declare.

ID.—CONSTRUCTION OF CONSTITUTION—LEGISLATURE MAY DETERMINE PERSONS ENTITLED TO SUE—EXCLUSION OF HUSBANDS AND DISTANT COLLATERAL HEIRS.—Such constitutional provisions were not intended to make it necessary that the legislature, when conferring new rights of action upon particular classes of citizens for injuries not previously actionable, should by the same act declare that all persons who may suffer damages for injuries of that character shall also have such right of action. The decision of the legislature as to how far it will extend the new right is conclusive, unless it appears beyond rational doubt that an arbitrary discrimination between persons or classes similarly situated has been made without any reasonable cause therefor. It cannot be said that there is no reasonable ground for the exclusion of husbands and collateral heirs of the third degree from the benefits of the act.

ID.—SPECIAL LAW OF NEGLIGENCE AS BETWEEN EMPLOYER AND EMPLOYEE.—A law establishing rules of liability for negligence applying only to actions arising from the relation between employees and employers does not violate such constitutional provisions, that relation being sufficiently peculiar and distinct from others to warrant legislation for it as a class distinct from other relations.

ID.—EFFECT OF SECTION 1970 OF CIVIL CODE ON SECTION 377 OF CODE OF CIVIL PROCEDURE.—The precise extent to which section 1970 of the Civil Code, as amended in 1907, may prevail over the previously enacted section 377 of the Code of Civil Procedure, so far as they

authorize actions for injuries causing death, is not determined. The latter section is general, applying to all persons. The former applies only to injuries arising out of the relation of employer and employee. It is held, however, that so far as injuries arising out of that relation are made actionable where death ensues, where they were not actionable before, section 1970 is now the only statute authorizing the action.

ID.—PURPOSE OF AMENDMENT OF SECTION 1970 OF CIVIL CODE—MODIFICATION OF “FELLOW-SERVANT” DOCTRINE.—The main purpose of the amendment of 1907 to section 1970 of the Civil Code was the modification of the “fellow-servant” doctrine, whereby the mere pleading and proof that the injury or death was caused by the negligence of a coemployee in the same department of labor with the person injured or killed was available as a defense.

ID.—DEATH OF EMPLOYEE THROUGH NEGLIGENCE OF FELLOW-SERVANT—ACTION BY PERSONAL REPRESENTATIVE—NO CAUSE OF ACTION ON BEHALF OF NEPHEW.—Since the enactment of the amendment of 1907 to section 1970 of the Civil Code, where the death of an employee is occasioned through the negligence of a fellow-servant engaged in another department of labor, no cause of action against the employer accrues to the personal representative of the deceased employee on behalf of his nephew, no matter what pecuniary loss said nephew might suffer by reason of his uncle’s death.

ID.—CONSTRUCTION OF AMENDMENT—CAUSE OF ACTION FOR DEATH OF EMPLOYEE—LIMITATION TO SPECIFIED BENEFICIARIES.—In construing paragraph three of that section, providing that when death results from an injury to an employee *received as aforesaid*, his personal representatives shall have a right of action therefor against the employer, for the benefit of certain enumerated beneficiaries, the words “received as aforesaid” should not be limited to the case of a death occasioned in the manner specified in paragraph two of the section, that is, to one caused by the defective or unsafe condition of machinery or appliances furnished by an employer. So construed, such paragraph, giving such right of action only on behalf of the specified beneficiaries, is applicable to the case of an employee killed through the negligence of a fellow-servant.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Rothchild, Golden & Rothchild, and J. A. Pritchard, for Appellant.

Samuel Rosenheim, and Bernard Silverstein, for Respondent.

Frank H. Short, F. E. Cook, L. A. Redman, and L. T. Hatfield, *Amici Curiae*.

SHAW, J.—After the decision of this case in Department Two, a rehearing was granted before the court in Bank. With the exception of the statement in the department opinion to the effect that the heirs of a deceased person may maintain an action under section 377 for an injury causing his death against an employer who is liable only because of the new provisions contained in the amended section 1970 of the Civil Code, we adhere to the department opinion. Said statement was not necessary to the decision.

Upon the argument before the court in Bank it was contended that the paragraph of the amendment to section 1970, declaring who may sue for an injury causing death, is unconstitutional because that subject is not embraced in the title of the act, that the entire act is unconstitutional because it embraces two subjects, and that said paragraph is also invalid because it is discriminatory and not uniform in its operation. Additional briefs have also been filed upon the question of the effect of this paragraph upon section 377 of the Code of Civil Procedure, claiming that section 1970 covers the entire subject and wholly supersedes and repeals section 377.

1. The title is as follows: "An act to amend section 1970 of the Civil Code of the state of California, relating to the responsibility of employers for injuries to or death of employees." (Stats. 1907, p. 119.) The constitution declares that every act shall embrace but one subject, which subject must be expressed in its title. (Art. IV, sec. 24.) It is not necessary to discuss this question at length. The act relates to the responsibility of employers for the death of employees. This general subject properly includes provisions declaring who may sue the employer for damages resulting from such death. The details need not be expressed in the title. (*Ex parte Liddell*, 93 Cal. 637, [29 Pac. 251]; *Abeel v. Clark*, 84 Cal. 229, [24 Pac. 383]; *Matter of Miller*, 162 Cal. 687, 700, [124 Pac. 427].) It follows also that the act embraces but one subject.

2. The paragraph does not violate the constitutional provision requiring general laws to have uniform operation, nor that forbidding a grant of special privileges to one citizen or class which are not given on the same terms to all. (Art. I, secs. 11, 21.) Upon this point, the argument is that it gives a right of action for damages against an employer in favor of the widow, children, dependent parents, and dependent brothers and sisters of an employee whose death is caused by an injury received from negligence of a fellow-servant, and does not grant such right in favor of the husband, nephews and nieces, or other collateral heirs of the person so killed. A right of action to an heir for an injury to an ancestor does not exist at common law. It is not an inherent right. It exists only so far and in favor of such person as the legislative power may declare. The constitutional provisions aforesaid were not intended to make it necessary that the legislature, when conferring new rights of action upon particular classes of citizens for injuries not previously actionable, should by the same act declare that all persons who may suffer damages from injuries of that character shall also have such right of action. Many considerations of public policy affect the question of the propriety and extent of such laws, the weight and effect of which, and the method of meeting or avoiding them, are matters resting exclusively in the legislative discretion. The probable number of husbands, or of collateral heirs of the third degree, who may suffer damage from such deaths, their probable necessitous circumstances and the consequences of extending the right to a more numerous and remote class, are among the circumstances to be considered. The decision of the legislature as to how far it will extend the new right is conclusive, unless it appears beyond rational doubt that an arbitrary discrimination between persons or classes similarly situated has been made without any reasonable cause therefor. (*Matter of Miller*, 162 Cal. 687, 698, [124 Pac. 427]; *Ex parte Martin*, 157 Cal. 57, [26 L. R. A. (N. S.) 242, 106 Pac. 235].) It cannot be said that there is no reasonable ground for the exclusion of husbands and collateral heirs of the third degree from the benefits of the act. Hence we must give it effect as an act within the legislative discretion. A law establishing rules of liability for negligence applying only to actions arising from the relations

between employees and employers, does not violate the constitutional provisions in question. The relation of employer and employee is sufficiently peculiar and distinct from others to warrant legislation for it as a class distinct from other relations.

3. We do not consider it necessary in this case to determine the precise extent to which section 1970 may prevail over section 377 so far as they respectively authorize actions for injuries causing death. The latter is general, applying to all persons. The former applies only to injuries arising out of the relation of employer and employee. So far as injuries arising out of that relation are made actionable where death ensues, where they were not actionable before, section 1970 is now the only statute authorizing the action. The language of the opinion in department is to be understood to refer only to such actions. Farther than this we need not go. The present case arose out of the newly created liability.

The judgment is affirmed.

Henshaw, J., Sloss, J., Angellotti, J., and Melvin, J. concurred.

The following is the opinion of Department Two, rendered on June 13, 1912, referred to and adopted in the foregoing opinion in Bank.

MELVIN, J.—A demurrer to the complaint in this case having been sustained without leave to amend and the judgment having been accordingly entered in favor of the defendant, an appeal therefrom is taken by plaintiff.

The action was commenced by the administrator of the estate of Albert D. Shepard on behalf of a nephew of the deceased, for damages alleged to be due by reason of the death of said Shepard caused by the negligence of defendant's servant. There were three counts in the complaint, all of them setting forth the alleged interest of Wayne Shepard, the minor in whose behalf the action was brought. According to these averments Albert D. Shepard was over the age of twenty-one years; he was a housesmith earning from seven dollars and fifty cents to twenty dollars a day; was employed to place certain iron fittings in and about the elevator shafts in defend-

ant's building, and in the performance of said work it became necessary for him to project himself into the elevator shafts as defendant well knew. While he was so performing his duties, defendant's night watchman negligently set in motion one of the elevators which, striking Albert D. Shepard, caused his death. There was no contributory negligence on the part of said Albert D. Shepard. It was further alleged that Albert D. Shepard left surviving him two brothers and Wayne Shepard, aged six, the son of a deceased brother; that Wayne's mother was in impoverished circumstances and was unable to maintain her child; that Wayne Shepard was supported by his uncle Albert; that the latter regularly contributed sums varying from fifty dollars to seventy-five dollars per month for the maintenance of his said nephew; that plaintiff knew of no damage sustained by the brothers of the deceased; and that Wayne Shepard was damaged in the sum of twenty-five thousand dollars for the carelessness of defendant in causing the death of Albert D. Shepard.

Appellant insists that section 1970 of the Civil Code, which was adopted many years after section 377 of the Code of Civil Procedure went into effect, does not repeal the latter section, but that the right of action is cumulative with that conferred by the Code of Civil Procedure. Appellant's theory of the relation between these two sections is that while the third paragraph of section 1970 of the Civil Code may in some degree modify the right of action conferred by section 377 of the Code of Civil Procedure, it restricts that right of action only so far as it would arise from a state of facts contemplated by the second paragraph of section 1970 of the Civil Code, and in no manner changes the right of action conferred by the Code of Civil Procedure arising by reason of the death of an employee caused by the negligence of a fellow-servant in a different department of labor. In order that we may the better analyze these theories it may be well to quote the two sections:

"Sec. 1970 (Civ. Code). An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was com-

mitted in the performance of a duty the employer owes by law to the employee, or unless the employer has neglected to use ordinary care in the selection of the culpable employee; provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or default of a coemployee engaged in another department of labor from that of the employee injured, or employed upon a machine, railroad train, switch signal point, locomotive engine, or other appliance than that upon which the employee is injured is employed, or who is charged with dispatching trains, or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine shop or other industrial establishment.

“Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same or continued in the use thereof.

“When death, whether instantaneous or otherwise, results from an injury to an employee *received as aforesaid*, the personal representative of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated, but no more than one action shall be brought for such recovery.

“Any contract or agreement, express or implied, made by any such employee to waive the benefits of this section, or any part thereof, shall be null and void, and this section shall not be construed to deprive any such employee or his personal

representative, of any right or remedy to which he is now entitled under the laws of this state.

“The rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under this section, except in so far as the same are herein modified or changed.”

“Sec. 377 (Code Civ. Proc.). When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just.”

We can see no reason for adopting the reading which would make the words “received as aforesaid” refer only to the second paragraph of section 1970 of the Civil Code. The main purpose of the amendment to that section, adopted in 1907, was the modification of the “fellow-servant” doctrine whereby only pleading and proof that the injury or death was caused by the negligence of a coemployee in the same department of labor with the person injured or killed was available as a defense. The legislature might well have believed that in thus curtailing this defense, it should in fairness to defendants more accurately than did section 377 of the Code of Civil Procedure designate the persons for whose benefit the personal representative of one who had been killed because of another’s negligence might prosecute an action, but whatever may have been the purpose, the words “received as aforesaid,” neither in themselves nor because of their location in the section indicate the intention of giving them a special limitation to the paragraph preceding the one in which they are used. Giving to these words their ordinary meaning they apply as well to the case of an employee killed through the negligence of a fellow-servant as to one whose death is caused by the defective or unsafe condition of machinery or appliances furnished by an employer. The complaint here, as appellant insists, is one which charges the death of plaintiff’s decedent through the negligence of a fellow-servant engaged in another department of labor; but in such a case no right

of action accrues to an administrator on behalf of a nephew of his decedent. As Wayne Shepard does not come within any of the classes mentioned in paragraph 3 of section 1970 of the Civil Code, no cause of action is stated in the complaint, no matter what pecuniary loss said nephew might suffer by reason of his uncle's death. This reading of section 1970 of the Civil Code does not interpret that section as repealing section 377 of the Code of Civil Procedure. The last named section appears in that part of the code relating to "parties to civil actions." Section 1970 of the Civil Code does not take away the "right of action" by a personal representative as outlined in section 377 of the Code of Civil Procedure, but it does affect the "cause of action" when such representative seeks damages on behalf of a collateral relative of his decedent of the third degree. In such a case no recovery is possible. It is to be noted also that section 377 still gives a right of independent action to heirs which is not granted by the Civil Code; but when an administrator brings suit his powers are limited by section 1970 of the Civil Code, which is the last declaration of the legislature on the subject.

The judgment is affirmed.

Henshaw, J., and Lorigan, J., concurred.

[S. F. No. 6119. Department One.—January 21, 1913.]

P. J. O'BRIEN, Appellant, v. C. O. NELSON and ANNIE REARDON, Respondents.

ESTATES OF DECEASED PERSONS—FINAL SETTLEMENT—NEW ADMINISTRATION WHEN AUTHORIZED.—After final settlement of the estate of an intestate, the court having probate jurisdiction is not bound to issue further letters of administration and should not do so, unless there still remains property of the estate not fully disposed of, or some act to be done relating thereto which only an administrator can do. This rule is implied by section 1698 of the Code of Civil Procedure, providing that the final settlement of an estate shall not prevent the issuance of further letters of administration thereon, if other property of the estate be discovered, or if good cause appears therefor.

ID.—ESTATE OF MARRIED WOMAN—PROPERTY TREATED AS COMMUNITY PROPERTY—DISTRIBUTION TO ASSIGNEE OF HUSBAND.—An administration upon the estate of a married woman dying intestate is not rendered void or ineffectual merely because of the fact that the record therein shows that the court declared that the property as to which administration was had was the community property of the decedent and her surviving husband, and distributed it all to an assignee of the husband.

ID.—ERROR IN DISTRIBUTION DOES NOT AUTHORIZE NEW ADMINISTRATION. If such property was the separate property of the decedent, that fact would not authorize a new administration thereon. The prior distribution of it as community property would be a mere error, which her heirs could correct only by moving for a new trial, or by taking an appeal from the decree of distribution. In the absence of such proceedings, the decree became final and conclusive upon them.

APPEAL from an order of the Superior Court of Santa Clara County denying a motion for a new trial of an application for letters of administration upon the estate of a deceased person. P. F. Gosbey, Judge.

The facts are stated in the opinion of the court.

J. C. Black, for Appellant.

A. A. Caldwell, for Respondents.

SHAW, J.—We give the title as above set forth because it so appears in the transcript and papers filed in this court. The correct title of the cause would be: "In the Matter of the Estate of Annie Nelson, Deceased." The appeal is taken from an order denying the appellant's motion for a new trial in the matter of his application for letters of administration upon the estate of said Annie Nelson. The application was contested by C. O. Nelson and Annie Reardon, the matter was duly tried, findings were made and filed and the order denying said petition was entered on March 13, 1911.

Annie Nelson died intestate on February 19, 1910. The application of the appellant for letters of administration upon her estate was filed on December 2, 1910. The evidence showed that there had been a previous administration of the estate, that the same had been fully completed and distribu-

tion thereof made and that the decree of distribution had become final at the time of the hearing of the contest. Annie Reardon was appointed administratrix thereof on March 19, 1910, and the decree of distribution was made on September 30, 1910. The proceedings were in all respects regular. It is admitted that the petition upon which she was appointed contained a statement of all the facts necessary to confer upon the court jurisdiction of the matter of the administration of the estate and that the required notices were duly given. It is not claimed that there remains any estate not administered. Indeed, the property described in the petition of the appellant as the property of said decedent is precisely the same as that described in the former petition of Annie Reardon and in the said decree of distribution. It is well established that, after final settlement of an estate, the court having probate jurisdiction is not bound to issue further letters of administration, and should not do so, unless there still remains property of the estate not fully disposed of, or some act to be done relating thereto which only an administrator can do. (*Murphy v. Menard*, 14 Tex. 67; *San Roman v. Watson*, 54 Tex. 254; *Wilcoxon v. Reese*, 63 Md. 545; *Myers v. Baltimore etc. Co.*, 73 Md. 425, [21 Atl. 58]; *Grayson v. Weddle*, 63 Mo. 539; *Long v. Joplin etc. Co.*, 68 Mo. 427; *Haven v. Haven*, 69 N. H. 204, [39 Atl. 972]; *Glover v. Hill*, 85 Ala. 41, [4 South. 613].) This is implied by section 1698 of the Code of Civil Procedure, providing that the final settlement of an estate, as provided in the code, shall not prevent the issuance of further letters of administration thereon, if other property of the estate be discovered, or if good cause appears therefor. The implication is that there should be no issue of subsequent letters where no other property is discovered, and no good cause appears therefor.

The appellant claims that the former administration was void or ineffectual because of the fact that the record therein shows that the court declared that the property as to which administration was had was the community property of the decedent and C. O. Nelson, her surviving husband, and distributed it all to Annie Reardon, to whom Nelson had conveyed all his title and interest therein. This does not make the proceedings or decree void. At the most it was a mere error, a mistake injurious to the persons who would have

inherited the property from Annie Nelson if it had been her separate estate, and which they could correct only by moving for a new trial, or by taking an appeal from said decree. In the absence of such proceedings for a review of that decree, it became final and conclusive upon all heirs, legatees, and devisees. (Code Civ. Proc., sec. 1666.) If, as a matter of fact, the property did belong to C. O. Nelson, as the survivor of the community, it did not form any part of the estate of his wife, it is no part of that estate at the present time, and no administration of her estate should be had to interfere with it. If it was her separate estate, then, as before stated, the distribution of it to the grantee of Nelson was final and conclusive and no further administration of it can be made.

We do not deem it necessary to notice the other points made in support of the appeal. There is no dispute regarding the facts above stated and they conclusively sustain the decision of the court below.

The order is affirmed.

Angellotti, J., and Sloss, J., concurred.

Hearing in Bank denied.

[S. F. No. 6258. Department One.—January 22, 1913.]

In the Matter of the Estate of **CONSTANCIA MOLLENKOPF**, Deceased.

WILL—CONTEST BEFORE PROBATE—TIME FOR FILING WRITTEN OPPOSITION.—In the case of a contest of a will before probate, the Code of Civil Procedure nowhere in terms prescribes when the written opposition must be filed, in order to entitle it to be considered. Obviously, to be effectual as a contest before probate, it must be filed before the alleged will is admitted to probate, and the statute contemplates that it will be filed at or before the time designated in the notice for the hearing of the petition for probate. But the person proposing to contest before probate does not forfeit his right to do so merely by reason of failing to file his opposition at or prior to the time so designated in the notice for the hearing.

ID.—OPPOSITION FILED BEFORE TIME OF CONTINUANCE OF HEARING.—A written opposition to the probate, which was properly served on the attorney for the petitioner, and filed before the time to which the hearing of the petition for probate had been continued, is in time and must be considered, and is a bar to the admission of the will to probate, until disposed of in the manner provided by law.

ID.—TAKING PRELIMINARY TESTIMONY AT DATE OF HEARING—CONVENIENCE OF WITNESS—TESTIMONY TAKEN WITHOUT PREJUDICE TO CONTESTANT.—Where the written opposition is so served and filed, the mere fact that the court, at the time designated in the notice for the hearing of the petition for probate, received testimony in support of the will sufficient to make a *prima facie* case for its admission, does not defeat the right to maintain such contest, if the court, at the time of taking such testimony, expressly declared that he did so preliminarily and merely for the convenience of witnesses and without prejudice to the rights of the contestant.

ID.—REFUSAL TO ENTERTAIN CONTEST—CONTESTANT PREJUDICED.—The refusal of the court to entertain a properly instituted contest of a will before its probate must be deemed prejudicial to the contestant, notwithstanding the law gives the contestant the right to institute a new contest at any time within one year after the alleged will is admitted to probate.

APPEAL from an order of the Superior Court of the City and County of San Francisco admitting a will to probate. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

I. B. Dockweiler, Costello & Costello, Robert B. Murphy, and A. W. Brouillett, for Appellant.

F. G. Hentig, and Haas & Dunnigan, for Respondent.

ANGELLOTTI, J.—This is an appeal from an order admitting a certain document to probate as the last will of deceased, and appointing the petitioner William Mollenkopf executor thereof without bond as specified therein.

The material facts on this appeal are substantially as follows: The petition for the probate of said alleged will came on for hearing on March 19, 1912, at ten o'clock A. M. At that time no written grounds of opposition had been filed. One of the attorneys of the contestant (Juliana R. de Long, mother of deceased) announced to the court that written

grounds of opposition to the probate had been mailed in Los Angeles to the clerk of said court the day before, and were then due in San Francisco, and that a copy thereof had been served on petitioner's attorney the day before. The court announced that "as some of the witnesses had come from Los Angeles, he would hear their testimony preliminarily and without prejudice to the rights of the contestant." Witnesses were then called and examined on behalf of the petitioner, and gave testimony that the will was duly executed, and that deceased was of sound mind and not acting under duress, fraud, etc. The court then stated that it would continue the further hearing of the matter to two o'clock P. M. of the same day, which was done. Prior to that time the written opposition to the probate was filed in the office of the clerk of said court, and the same showed, by affidavit attached thereto, that it had been served by copy on the attorney for the petitioner, by the leaving of such copy in his office with a person in charge thereof under the circumstances and in the manner specified in subdivision 1 of section 1011 of the Code of Civil Procedure. This written opposition was in proper form, and to use the language of *In re Stewart*, 100 Cal. 249, [34 Pac. 707], "set forth many alleged facts which, if true, established the invalidity of the asserted will." When the matter came on for further hearing at two P. M., the written opposition on file, with proof of service, was brought to the attention of the court. The court then ruled that as the written opposition was not on file at ten A. M. of that day, the same should be disregarded, and also that the attorney for petitioner had not received sufficient notice. Thereupon the order admitting the will to probate and appointing petitioner executor was made, without any other disposition of the written opposition to probate.

It is not disputed that if the written opposition was properly served on petitioner's attorney and was not filed too late to entitle it to be considered, it was a bar to the admission of the alleged will to probate, until disposed of in the manner provided by law. Such disposition involved an opportunity to those interested in the will to answer the opposition, and a trial of the issues thus made, by a jury if either party so requested.

It is not suggested by respondent that service of the written opposition, by copy, was not made on petitioner on March 18, 1912, in all respects as required by law, and we are satisfied that the affidavit attached to the written opposition sufficiently showed due service.

Our law nowhere in terms prescribes *when* the written opposition must be filed, in the case of a contest before probate, in order to entitle it to be considered. Notice of the time appointed for the probate having been provided, it is declared in section 1306 of the Code of Civil Procedure that, "at the time appointed for the hearing, or the time to which the hearing may have been postponed, . . . the court must hear the testimony in proof of the will." In section 1307 of the Code of Civil Procedure it is declared that "any person interested may appear and contest the will," and in section 1308 of the Code of Civil Procedure, that "if no person appears to contest the probate of a will, the court may admit it to probate on the testimony of one of the subscribing witnesses only," etc. By section 1312 of the Code of Civil Procedure it is declared that "if any one appears to contest the will, he must file written grounds of opposition to the probate thereof," etc. Obviously, to be effectual as a contest before probate, the written opposition must be filed before the alleged will is admitted to probate, but there is nothing in the provisions of our code that in terms makes it ineffectual if filed at any time prior to the admission of the will to probate. The statute contemplates, of course, that it will be filed at or before the time designated in the notice for the hearing of the petition for probate, and inasmuch as, in the absence of a contest, the formal proofs as to execution, etc., may be and are ordinarily then received and the alleged will admitted to probate, a party desiring to contest will naturally file his opposition at or prior to the time so designated. But the person proposing to contest before probate does not forfeit his right to do so merely by reason of failing to file his opposition at or prior to the time so designated in the notice for the hearing.

It has been held that if the contest is properly instituted before the time to which the hearing on the petition is continued, it is in time and must be considered. This is practically held in *Estate of Stewart*, 100 Cal. 246, [34 Pac. 706]. It is true that in that case the opposition was on file at the

original time fixed for hearing, but there was then lacking proof of service thereof on certain parties other than the petitioner who were required by the statute to be served. A motion to strike the opposition from the files on the ground that the same had not been filed or served as required by law was made, and this motion was taken under advisement until two P. M. of the same day. Before that time arrived, contestant supplied such proofs, but the lower court held that they should have been filed at ten A. M. and came too late. It therefore struck the opposition from the files and admitted the will to probate. This court held: 1. That the absence of such proof of service was no warrant for a disregard of the contest as to the petitioner for probate, as to whom proof of service was on file; and 2. Assuming that such absence of proof rendered the opposition ineffectual, nevertheless, the furnishing of such proof "before the hour to which the matter had been continued" sufficiently answered the objection of petitioner; in other words, that if all the requirements of the law as to the institution of a contest are complied with at or prior to the time to which the hearing on the petition is continued, the contest is in time, even though none of such requirements was complied with at or prior to the time designated for hearing by the notice. In the case just cited, this court said that "under these circumstances, we see no ground upon which the order appealed from (the order admitting the will to probate) can be affirmed." That a contest initiated after the time originally appointed for the hearing of the petition but before the hour to which such hearing has been postponed, is in time, has twice been held by the supreme court of Montana, upon statutes substantially similar to ours. (See *Raleigh v. District Court*, 24 Mont. 306, [81 Am. St. Rep. 431, 61 Pac. 991]; *State v. District Court*, 25 Mont. 355. [65 Pac. 120].) We think that there can be no doubt as to the correctness of these rulings, in view of the statutory provisions in California and Montana on the subject.

The record on appeal, fairly construed, brings this case within the doctrine of these decisions. Much reliance is placed by respondent upon the fact that the court did receive testimony in support of the will at the morning session and before continuing the further hearing to two P. M., and he claims that the record shows that the hearing was then completed, no

further testimony having been given at the afternoon session. But the bill of exceptions shows that in response to the statement of counsel for the contestant as to the proposed contest, the learned judge of the trial court announced that "as some of the witnesses had come from Los Angeles he would hear their testimony preliminarily and without prejudice to the rights of the contestant," and that after doing this, he continued the further hearing of the matter to two o'clock P. M. This was practically, for all the purposes of a contest, a continuance of the whole hearing from the time originally set until two o'clock P. M. of the same day, and it was a continuance that the court had power to grant. Under the authorities already cited, the contest was therefore filed in time. The mere receiving of testimony at the morning session under the circumstances stated in no wise affects the question, even though thereby a *prima facie* case for the admission of the will to probate was shown.

We are by no means prepared to concede that a failure to file a contest before the commencement of the taking of testimony on a petitioner's application, would under any circumstances preclude the filing of the same subsequently, and before the matter was finally submitted to the court for decision. But we are not called upon to determine this question here, as we are satisfied that upon any fair construction of the record the contest must be held to have been instituted before the time to which the matter had been continued for hearing from the time originally fixed, the testimony actually received at the first session being expressly declared to be received preliminarily or *in advance*, merely for the convenience of the witnesses from Los Angeles, and "without prejudice to the rights of the contestant."

Although contestant was not barred by the order admitting the will to probate from instituting a new contest at any time within one year after the alleged will was admitted to probate, it cannot be held, and indeed is not claimed, that she is not substantially prejudiced by the disregard of her contest before probate. One result of such contest, if successful, would have been to prevent the petitioner for probate from acting as executor without bonds, and if appointed administrator of the estate of deceased, he would be required to give security for the faithful performance of his duties. As the owner of

half of the property of the decedent if the will was invalid, contestant was substantially interested in having proper security for the discharge of his duties by the person administering the estate. She would have no such security under the order appealed from during the pendency of any contest instituted by her after probate. We do not mean to suggest that this is the only reason for holding the order prejudicial to contestant's substantial rights.

The order appealed from is reversed.

Shaw, J., and Sloss, J., concurred.

[Sac. No. 2010. In Bank.—January 23, 1913.]

MRS. MINNIE BAUMANN and MRS. JENNIE ERIKSON, Appellants, v. F. G. KUSIAN et al., Defendants and Respondents; LUCIE FISCHER, Intervener and Respondent.

SPECIFIC PERFORMANCE—CONTRACT TO MAKE WILL.—To warrant the specific enforcement of a contract to make a will in favor of a particular person, the contract must be definite and certain and also just and fair.

ID.—ORPHANS TAKEN FROM CHARITABLE INSTITUTION—PROMISE TO CARE FOR AS CHILDREN—INDEFINITENESS OF CONTRACT.—A contract entered into by a man and wife, at the time of taking two orphan minors from a charitable institution of which they were inmates, to the effect that they would take such children to their home, and would take good care of them and would rear and educate them in a suitable and proper manner, and would treat them in all respects as their own children, is too indefinite and uncertain to warrant a construction that would impose any obligation on the promisors to bequeath or devise any property to such children, or even to make them their heirs by legally adopting them as their own children.

ID.—SURSEQUENT PROMISE TO LEAVE PROPERTY TO CHILDREN—UNCERTAINTY OF CONTRACT—UNFAIRNESS AND INADEQUACY OF CONSIDERATION.—Promises subsequently made by such man and wife to such minor children, at various times while the latter were living with them as a part of their family, to the effect that if they continued to remain with them at their home, they should have their property, in consideration of which the children agreed to remain with them for an unspecified and indefinite time, and did so remain until their

respective marriages, during all of such time conducting themselves as dutiful children and rendering dutiful services to them, will be refused specific performance as a contract to make a will in favor of such children, both on account of the vagueness and uncertainty of the promises of the children, and also because their promises did not constitute a fair and adequate consideration for the contract.

ID.—ENFORCEABILITY OF CONTRACT TO MAKE WILL.—Courts of equity will, under special circumstances, enforce a contract to make a will, or to make a certain testamentary disposition; and this may be done, even when the agreement was parol, where in reliance upon the contract the promisee has changed his condition and relation so that a refusal to complete the agreement would be a fraud upon him.

APPEAL from a judgment of the Superior Court of Tehama County. John F. Ellison, Judge.

The facts are stated in the opinion of the court.

McCoy & Gans, for Appellants.

Jno. J. Wells, for Defendants and Respondents.

W. P. Johnson, and W. A. Fish, for Intervener and Respondent.

ANGELLOTTI, J.—The demurrers of the defendants and intervener to plaintiffs' amended complaint, on the ground that the same does not state facts sufficient to state a cause of action, having been sustained without leave to amend, judgment was given that plaintiffs take nothing. This is an appeal by plaintiffs from such judgment.

The action is one to obtain a decree declaring the plaintiffs to be the owners of and entitled to receive all the property of one Christiane W. Fischer, deceased, subject to the administration of her estate pending in the superior court of Tehama County, their claim being substantially that deceased had contracted to leave all of her property to them when she died and had failed to do so. The defendants are heirs of deceased and the intervener is an adopted daughter. The action is thus practically one against the heirs of deceased to specifically enforce an alleged contract of deceased by which she agreed to make a will in favor of plaintiffs.

The amended complaint substantially alleges as follows:

On September 28, 1892, deceased and her husband, Herman A. F. W. Fischer, executed mutual wills, each leaving to the other all of his or her property. On October 8, 1892, each executed a codicil providing that no part of his or her estate should go to a specified adopted daughter, and reaffirming the will in all other respects. Mr. Fischer died November 29, 1908, and under his will all of the property of his estate was distributed to Mrs. Fischer. Mrs. Fischer died December 28, 1910, leaving no lineal descendant and leaving all the property acquired from her husband's estate and other property, the same being of the value, after the payment of debts and expense of administration, of not exceeding twelve thousand dollars. She made no other will than that above referred to and this will has been admitted to probate.

On April 9, 1896, plaintiffs, who were in no way related to either of the Fischers, were, and for some years had been, orphan children, and were inmates of "The Five Points House of Industry" of the city of New York, state of New York, being cared for thereby. They were respectively eleven and fourteen years of age. On or about April 9, 1896, the Fischers, who then lived in the state of Iowa, took them from said institution to their home. Plaintiffs remained with the Fischers at their home in Iowa until January, 1901, when the Fischers moved to Corning, California, the plaintiffs accompanying them. They continued to live with the Fischers in California until their respective marriages. Plaintiff Minnie Baumann was married in October, 1905, and plaintiff Jennie Eriksson was married in September, 1903. From April 9, 1896, until their respective marriages, each bore the name of Fischer as her family name, and during the whole of said period each treated the Fischers as her lawful parents and rendered to them "dutiful service."

At the time the Fischers took the plaintiffs from said institution they promised and agreed that "they would take said plaintiffs to their home and would take good care of them and would rear and educate them in a suitable and proper manner, and that they would treat them in all respects as their own children." The plaintiffs were then being well cared for and well reared and educated in said institution, and if the Fischers had not taken them, they would have continued to

have been well cared for and educated therein, or placed in some suitable family for such care and education. The authorities of said institution would not have permitted the Fischers to take plaintiffs if it had not been for such promises and agreements on their part. Such promises and agreements were made by the Fischers for the purpose of securing plaintiffs from said institution.

On divers occasions while plaintiffs were living with the Fischers in Iowa they "became homesick to return to the said Home in New York." The Fischers promised and agreed to and with them that "if they would remain with them at their said home in Iowa, they would rear and educate them in a suitable and proper manner and treat them in all respects as their own children, and that they, said plaintiffs, should have the property of the said Fischers," and frequently told them that they had adopted them and that they should have their property, and that they had made a will for them. Plaintiffs believed all these statements, and on account thereof remained with the Fischers. They would not have so remained but for said promises and agreements. The Fischers made such promises for the purpose of inducing plaintiffs to remain with them as their own children.

When, in 1901, the Fischers were about to move to California, they renewed such promises, and because thereof plaintiffs came to California with them, and would not otherwise have come. After coming to California the Fischers renewed said promises "from time to time . . . and up to the time of and even after the marriage of plaintiffs."

It was substantially alleged that plaintiffs can be adequately compensated for the injury caused by the failure of the Fischers to leave them their property only by being awarded the residue of the property of Mrs. Fischer after the payment of debts and expenses of administration.

Although a failure on the part of both the Fischers to perform any of their promises and agreements is alleged, we do not understand that plaintiffs claim any part of the estate, or, indeed, any relief whatever, on account of any alleged failure on the part of the Fischers, except that relating to the alleged promise to leave their property to them. Obviously, plaintiffs are seeking specific enforcement of the alleged contract only in so far as that part thereof is concerned, and in deter-

mining whether they are entitled to such relief, it cannot at all assist them that the Fischers failed and neglected to perform other alleged promises and agreements. The general allegations as to such other failures and neglects may therefore be entirely disregarded.

It is clear enough from what we have said that the complaint does not show any promise or agreement on the part of the Fischers before they received these orphan children from the New York institution and took them to their home in Iowa, to the effect that they would bequeath or devise to them any of their property. Upon this point we cannot do better than to quote from the opinion of the learned trial judge, which is contained in respondents' brief. He said: "The terms on which they were to take and rear and educate the plaintiffs were fixed before they left the home in New York. Those terms were on the part of the Fischers that they would take the plaintiffs to their home in Iowa and take good care of them and rear and educate them in a suitable manner and treat them in all respects as their children. This was the whole offer on their part and by its acceptance by those acting on behalf of the plaintiffs it became the terms of the contract. There is nothing in this contract about making a will and leaving the plaintiffs property. Property is not mentioned. It does state that the Fischers agreed to treat them as their own children. But this does not imply that they would get the Fischers' property. There is no legal obligation resting on any parent to will any property to a child, if he does not feel so disposed and if he does not the child has no cause of action." It is well settled that to warrant specific enforcement of a contract of the character here alleged, the contract must be definite and certain. (See *Owens v. McNally*, 113 Cal. 444, 451, [33 L. R. A. 369, 45 Pac. 710], and cases there cited.) Certainly there is nothing alleged in the complaint as to the agreement made in New York that warrants a conclusion that such agreement is definite and certain to the effect that the Fischers undertook to bequeath or devise any property to plaintiffs, or even to make them their heirs by legally adopting them as their own children.

We are thus brought to what subsequently took place in Iowa between 1896 and the removal to California in 1901 as the sole basis of plaintiffs' claim. On divers occasions plain-

tiffs "became homesick to return to the said home in New York," and would not have remained with the Fischers but for the promises and agreements then made by them to and with plaintiffs, to induce them to remain. Those promises and agreements were that "if they (plaintiffs) would remain with them at their said home in Iowa," in addition to the fulfillment of the promises made in New York by the Fischers, plaintiffs should have the property of the Fischers, and that they, the Fischers, had adopted them and made a will for them. When about to come to California in 1901, the Fischers renewed said promises and statements, and because thereof plaintiffs came with them, and would not otherwise have come. During all the time plaintiffs were with the Fischers they were "dutiful children" to them and rendered "dutiful service" to them. Said promises and agreements and statements were renewed from time to time after the said coming to California, and even after the marriage of plaintiffs.

It is to be noted that there is no express allegation in the complaint as to what plaintiffs agreed to do in consideration of the alleged promises on the part of the Fischers except in so far as such undertaking may be implied from the allegations as to what they in fact did, namely: remained with the Fischers, both in Iowa and California, as a part of the family, until their respective marriages, and during all of said time conducted themselves as "dutiful children" to them, and rendered "dutiful service" to them. It is nowhere expressly alleged that there was ever any stipulation on the part of plaintiffs as to the time during which they were to continue to live with the Fischers or as to the kind of service they were to render them.

The principle applicable to cases of this character was stated by this court in *McCabe v. Healy*, 138 Cal. 81, 84, [70 Pac. 1008], quoting from Pomeroy on Specific Performance as follows: "Courts of equity will, under special circumstances, enforce a contract to make a will, or to make a certain testamentary disposition; and this may be done, even when the agreement was parol, where in reliance upon the contract the promisee has changed his condition and relations so that a refusal to complete the agreement would be a fraud upon him. The relief is granted, not by ordering a will to be made, but by regarding the property in the hands of the heirs, devisees,

or representatives of the deceased promisor, as impressed with a trust in favor of the plaintiff, and by compelling defendant, who must of course belong to some one of these classes of persons, to make such a disposition of the property as will carry out the intent of the agreement." The same doctrine had been substantially declared in an earlier case (*Owens v. McNally*, 113 Cal. 444, 448, [33 L. R. A. 369, 45 Pac. 710]), and the views expressed in these two cases have been followed in subsequent cases. It is entirely unnecessary in this case to consider to what extent the doctrine of these cases has been affected by the amendment of section 1624 of the Civil Code in the year 1905, by which a new subdivision was added to said section, including such contracts among those declared by the section to be invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent.

The facts alleged in the amended complaint are not such as to serve as a basis for a very strong appeal to the sense of justice of a court of equity, on the theory that there was such a change of conditions and relations on the part of plaintiffs, made in reliance on any promise or promises of the Fischers, that it would be a fraud upon them not to give them the Fischer property. When originally taken by the Fischers they were orphan children aged respectively eleven and fourteen years, without a single relative on earth so far as appears, and without any friend or home except such as was afforded them by the charitable institution of which they were inmates. They could expect nothing therefrom except such care, support, and education as are ordinarily afforded by such an institution, until such time as they might be placed in some family under such terms as the Fischers agreed to with the authorities of the institution. It is not to be assumed that they would have fared better in any other family than they did with the Fischers. They were furnished by the Fischers with a home until their respective marriages. So far as appears, they gave up and sacrificed absolutely nothing in the way of present or prospective advantage by remaining with the Fischers. This is especially true as to the situation when any alleged promise as to property was made, none of which promises is alleged to have been given until after they went to Iowa. Up to this time certainly, as was stated by the

learned judge of the court below, "it seems to have been just the ordinary case of a person taking a child from an orphan asylum to rear and educate it for whatever services it might render and for its companionship." There is nothing to indicate that it would have been to plaintiffs' advantage in any way to leave the Fischers, or to return to the charitable institution in New York, if they could have done so, or to remain in Iowa when the Fischers came to California. While with the Fischers they are not alleged to have rendered any unusual service. They simply conducted themselves as "dutiful children" and rendered "dutiful service." They certainly have received, so far as appears, what would ordinarily be considered adequate compensation for all they have given.

As we have said, it is settled that to warrant specific enforcement of a contract of the character here alleged, the contract must be definite and certain. It is also settled that it must be just and fair. It was said in *Owen v. McNally*, 113 Cal. 444, [33 L. R. A. 369, 45 Pac. 710], "But the question whether relief should be granted or denied in a particular case addresses itself to the conscience of the chancellor, and before a plaintiff entitles himself to it, many considerations enter and are to be weighed. . . . Where a contract such as this, resting in parol and sought to be enforced after the death of the other party to it, comes before a court of equity for review, it is scrutinized and should be scrutinized, with particular care, and only upon a satisfactory showing that it is definite and certain and just will it be enforced. The proofs of the contract should be clear, and the acts of the claimant referable alone to the contract."

We have already pointed out wherein the alleged contract is vague and uncertain as to the undertaking of plaintiffs in consideration of which the alleged promises on the part of the Fischers were made. From what we have said as to the facts of this case, as alleged in the complaint, we are of the opinion that it also sufficiently appears that there was no such showing of adequacy of consideration for the alleged promise of the Fischers in regard to their property as to appeal to a court of equity as requiring specific enforcement, in the face of the rule that the contract must be just and fair. That plaintiffs agreed simply to remain with the Fischers for some unspecified and indefinite time, conducting themselves during

said time as "dutiful children" and rendering "dutiful service," which is substantially all that appears, is, under all the circumstances of this case, far from such a fair and adequate consideration as would appeal to a court of equity as being fair and just. And finally, we agree entirely with what was said by the learned judge of the trial court, to the effect that it is not perceivable how the plaintiffs made such a sacrifice of present or prospective advantages in reliance upon the alleged statements of the Fischers, that it would now be a fraud upon them not to give them the Fischer property.

In one or two of the cases cited by learned counsel for plaintiffs, relief in the nature of specific enforcement was given, although it does not appear from the opinion that there was any explicit promise in the matter of property. Such a promise appears to have been implied in one case from an undertaking to provide for the child and bring her up as her own (*Van Tine v. Van Tine*, (N. J. Ch.) 1 L. R. A. 155, 15 Atl. 249), and in the other from a written statement in adoption proceedings which proved abortive to the effect that the deceased and his wife intended to make the child their heir. (*Wright v. Wright*, 99 Mich. 170, [23 L. R. A. 196, 58 N. W. 54].) Both cases were, by reason of their peculiar circumstances, what are called "hard cases," and the opinion in the last case cited was by a divided court, two out of five justices dissenting. We cannot at all accede to the view that relief may be given in such a case in the absence of a clear and definite promise on the part of the deceased to the effect that the child shall have his property or some specified portion thereof when he dies. We say this much with reference to the understanding and agreement at the time the Fischers took the plaintiffs in New York.

We find nothing in any of the other cases cited that requires notice. Each case must necessarily depend upon its own peculiar circumstances. We are satisfied that the lower court did not err in sustaining the demurrer to the amended complaint.

The judgment is affirmed.

Shaw, J., Sloss, J., Melvin, J., and Henshaw, J., concurred.

[S. F. No. 6094. Department One.—January 24, 1913.]

H. F. SUHR and H. C. MEISEL, Executors of the Will of LOUISE LAUTERBACH, Deceased, Substituted for said Louise Lauterbach, Respondents, v. GEORGE LAUTERBACH, Appellant.

LACHES—DEFENSE NEED NOT BE PLEADED—DENIAL OF DEFENDANT'S MOTION FOR JUDGMENT.—The defense of laches need not be pleaded, but when it appears from the evidence that the seeker of relief in equity has been guilty of laches, the court will deny such relief *sua sponte* without any pleading. The denial of defendant's motion for judgment on the ground of laches amounts to a declaration and finding to the effect that the plaintiff was not guilty of laches.

ID.—STATUTE OF LIMITATIONS—ELEMENTS CONSTITUTING LACHES.—Entirely independent of any statutory period of limitations, stale demands will not be aided in equity where the claimant has slept upon his rights for so long a time and under such circumstances as to make it inequitable to enter upon an inquiry as to the validity thereof, or to allow the remedy sought. Where such is the condition, the demand is, in a court of equity, barred by laches. Unless such conditions exist, the demand is not so barred.

ID.—QUESTION OF LACHES PRIMARILY FOR TRIAL COURT.—Whether such is the situation is a question in the first instance for the trial court, and if its conclusion thereon can reasonably be held to find sufficient support in the evidence, an appellate court should not interfere therewith.

ID.—CANCELLATION OF DEED—EVIDENCE INSUFFICIENT TO ESTABLISH LACHES.—In an action to set aside a deed executed by the plaintiff to her brother-in-law, on the ground that its execution was procured by means of duress and undue influence exercised by him upon her, it is held, upon a review of the evidence, that the trial court was justified in its conclusion that the defendant could not have been prejudiced by the plaintiff's delay of a year and nine and one-half months in commencing the action, and that the plaintiff was not guilty of laches.

ID.—RATIFICATION OF DEED—TAKING AND RECORDING CONTEMPORANEOUS INSTRUMENT.—The mere taking and recordation by such plaintiff of an instrument executed by the defendant practically contemporaneously with the deed and as part of the same transaction, whereby the defendant undertook, in conjunction with the plaintiff, to execute a note secured by a mortgage of the granted premises, if the same became necessary to raise money for the plaintiff's support, did not amount to a subsequent ratification of the deed.

APPEAL from a judgment of the Superior Court of Alameda County. N. A. Hawkins, Judge presiding.

The facts are stated in the opinion of the court.

Robert Edgar, and Oliver Youngs, Jr., for Appellant.

Frank V. Kington, for Respondent.

ANGELLOTTI, J.—This is an action initiated by Louise Lauterbach to obtain a decree adjudging a deed executed by her to defendant, the brother of her deceased husband, on November 24, 1906, to be null and void, and quieting her title to the land described therein as against said defendant, on the ground that the execution of the same was procured by defendant by means of duress and undue influence exercised by him upon her. This deed reserved to Mrs. Lauterbach a life estate in the property conveyed. The action was commenced on September 16, 1908. The findings and judgment were in favor of plaintiff. This is an appeal by defendant from such judgment. Since the taking of the appeal, Louise Lauterbach died, and the executors of her will have been substituted as plaintiffs.

1. No claim is made in the briefs that the evidence is insufficient to support any of the findings of the trial court.

2. It is claimed that Mrs. Lauterbach's right of action was "barred by reason of her laches in bringing suit." As we have seen, the date of the execution of the deed, as alleged in the complaint, was November 24, 1906, while the action was not commenced until September 16, 1908. The complaint was treated in the lower court by all the parties as sufficiently stating a cause of action, no objection by demurrer being made and the defendant answering upon the merits. Nothing was said about laches in the lower court until the very close of the trial, when all of the evidence on both sides had been received. Defendant then moved for judgment "on the ground of plaintiff's laches in commencing the action." Although the record does not show that the court formally ruled upon this motion, the judge saying only "Very well, the case is submitted," in view of the findings and the judgment the motion must be deemed to have been denied. We do not think

that the allegations of the complaint were such in so far as the question of laches is concerned, as to warrant us in holding, after answer, trial, and judgment, that the complaint failed to state a cause of action. The only question then is whether the evidence was such as to support the conclusion of the trial court that there was no such unreasonable delay on the part of Mrs. Lauterbach in asserting her right to avoid this deed as would bar her action. "It is well settled that the defense of laches need not be pleaded, but that when it appears from the evidence that the seeker of relief in equity has been guilty of laches the court will deny such relief *sua sponte* without any pleading." The denial of defendant's motion for judgment on the ground of laches amounted to a declaration and finding to the effect that the plaintiff was not guilty of laches. (*Stevinson v. San Joaquin etc. Co.*, 162 Cal. 141, [121 Pac. 398].)

The evidence indicates that the deed, although dated November 24, 1906, was not delivered until December 1, 1906. The time between the delivery of the deed and the commencement of the action was thus one year and nine and one-half months. This was much less than the period prescribed by our statute of limitation within which such an action may be brought. But, of course, that fact does not bar the defense of laches, which is based entirely on equitable principles. It is well settled that "entirely independent of any statutory period of limitations, stale demands will not be aided where the claimant has slept upon his rights for so long a time and under such circumstances as to make it inequitable to enter upon an inquiry as to the validity thereof." (*Klienclaus v. Dutard*, 147 Cal. 245, [81 Pac. 516].) "Where such is the condition, the demand is, in a court of equity, barred by laches." (*Id.*)

"As has often been said, there is no artificial rule as to the lapse of time or circumstances which will justify the application of the doctrine. Each case as it arises must necessarily be determined by its own circumstances." (*Id.*) "In order to bar a remedy because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is al-

lowed.''' (*Cahill v. Superior Court*, 145 Cal. 42, 47, [78 Pac. 767].) The plaintiff is not to be held barred from his remedy for the wrong alleged to have been done him, on the ground that he has been guilty of laches, unless his delay in bringing action has been of such length and under such circumstances that it would be inequitable to enter into an inquiry as to the validity of his claim or to allow such remedy. Whether such is the situation is a question in the first instance for the trial court, and if its conclusion thereon can reasonably be held to find sufficient support in the evidence, an appellate court should not interfere therewith.

The evidence in this case was such as to amply support a conclusion by the trial court to the effect that defendant could not have been prejudiced in the slightest degree by plaintiff's delay in commencing this action. The only matter suggested by counsel for defendant as to which such prejudice was or might be caused, was that he (defendant) had a claim for \$3,680.75 against plaintiff for services rendered and board, at the time of the delivery of the deed, which he claimed on the trial was the real consideration for the execution of the deed, that relying upon the deed he had failed to take any proceeding for the enforcement of his claim, and that at the time of the commencement of the action this claim had become barred by the statute of limitations. Of this alleged claim, as was shown by the account furnished by defendant on the trial, \$3,217 was already barred by such statute at the date of the delivery of the deed, and of the remaining \$463.75 at least ninety-eight dollars was not barred at the time of the commencement of this action, leaving only \$365.75 of the \$3,680.75 as to which defendant could have possibly lost any right by reason of the statute of limitations on account of plaintiff's delay. His additional charges, aggregating \$576.25, for alleged services, etc., subsequent to the delivery of the deed, were, of course, in no way imperiled by any statute of limitations by reason of the delay. The evidence was such as to support a conclusion that, regardless of the statute of limitations, defendant had no legal claim whatever against plaintiff at the time of the delivery of the deed, and had never asserted any such claim except for board for a short time, for which Mrs. Lauterbach testified he had been fully paid. The account presented by him on the trial, when for the first

time, apparently, Mrs. Lauterbach was made acquainted with the fact that he asserted any claim against her for money on account of services rendered, was of such a character, when considered in connection with the other evidence, as to warrant the learned judge of the trial court in entirely disregarding it, as is apparent from his opinion he did. There was also sufficient support in the evidence for the conclusion that there was no understanding on the part of plaintiff that she was deeding this property to defendant on account of any claim for money due him, and that the only thing in the way of consideration suggested to her was that he would see that she did not want anything during her lifetime. From what we have said it is clear that the court below was warranted in concluding that even as to the small portion of the asserted claim as to which the statute of limitations intervened as a bar between the time of the delivery of the deed and the date of the commencement of the action, defendant suffered no prejudice by reason of the delay.

It is further to be noted that there was evidence sufficient to support a conclusion that plaintiff made known to defendant very shortly after the delivery of the deed that she was not satisfied and wished to have the property back, and several times made a request of defendant to that effect. The evidence was also such as to support a conclusion that for a long time after the delivery of the deed plaintiff was to a great extent under the same influence that existed at the time of the execution thereof.

We are satisfied that it cannot be held that the conclusion of the lower court that plaintiff was not guilty of laches was not sufficiently supported by the evidence.

3. The other points made for reversal require but little notice.

There was no subsequent ratification by plaintiff of the deed. The instrument signed by defendant, dated November 23, 1906, but signed "after" the deed, and marked "Recorded at request of L. Lauterbach," relied on as showing such a ratification, was practically contemporaneous with the deed and part of the same transaction. This instrument was simply an undertaking on the part of defendant, "as a further consideration for the conveyance," to execute a note secured by mortgage on the property conveyed, in conjunction with

the grantor, to enable the grantor to obtain a loan thereon for her own use, if it became absolutely necessary to raise money in that way for her support. No such note or mortgage was ever given, or requested by plaintiff.

There is nothing at all in the claim that Mrs. Lauterbach was not damaged by the loss of her property.

The judgment is affirmed.

Shaw, J., and Sloss, J., concurred.

[L. A. No. 2799. In Bank.—January 24, 1913.]

EMIL S. GUGOLZ, Respondent, v. C. M. GEHRKENS,
Executor of the Last Will and Testament of Marie Gu-
golz, Deceased, et al., Appellants.

WILL—CONTRACT BETWEEN SOLE HEIR AND EXECUTORS TO DEFEAT PROBATE—ILLEGAL CONSIDERATION—PUBLIC POLICY.—A contract between the executors named in a will and the sole heir of the testator, by which the executors agreed, in consideration of the promise of the heir to bequeath to each of them by her last will a portion of her estate, to actually join with such heir in having the will set aside, regardless of its validity and in violation of the rights of other legatees who received benefits thereunder, to use the office to which they were appointed by the will to accomplish this result, and as executors named in the will to institute a proceeding for its probate and the issuance of letters testamentary to themselves for the sole purpose of enabling the heir to contest the same and to allow such contest to prevail by default on their part, regardless of the merits thereof, is not a mere agreement for the relinquishment of a valid right, or a matter which concerns the parties only, but is a contract opposed to public policy, and is based upon an illegal consideration.

ID.—PARTIES IN PARI DELICTO—AUNT AND NEPHEW.—In the absence of any evidence tending to show the exercise of undue influence by such heir over one of the executors, or that he was ignorant of the law, the mere fact that such heir was his aunt and was *in loco parentis* to him, and that he had barely attained his majority at the time the will was denied probate, does not prevent them from being *in pari delicto* in respect to such contract.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Leon F. Moss, Judge.

The facts are stated in the opinion of the court.

Mott & Dillon, and Louis W. Myers, for Appellants.

R. L. Horton, for Respondent.

ANGELLOTTI, J.—Plaintiff had judgment, from which and from an order denying their motion for a new trial defendants appeal. The action is one to enforce an alleged oral agreement made in 1881 by which Marie Gugolz, the deceased, agreed to make a will in favor of plaintiff to the extent of one-fourth of all the property that she should die possessed of. She died testate in January, 1907, leaving an estate of the value of about thirty-seven thousand dollars. By her will she bequeathed to various persons other than plaintiff sums aggregating about twenty-two thousand dollars. To plaintiff she left five dollars and no more. The defendants other than the executor of the will are all either legatees thereunder or heirs of the deceased. The trial court found in accord with the allegations of the complaint, and concluded that plaintiff was entitled to a one-fourth interest in the entire estate, subject to administration thereof, and that defendants are constructive trustees of such interest therein for the benefit or use of plaintiff.

Plaintiff was a nephew of the deceased husband of Marie Gugolz, Caspar Gugolz, being the son of a brother of said Caspar Gugolz. He lived with and was maintained and cared for by said Caspar and Marie Gugolz from 1871, when he was about ten years of age, to the time of death of Caspar, which occurred in December, 1881, in Denver, Colorado, where Caspar resided. He continued to live with deceased after the death of Caspar until some time in 1890, when he married, after which he lived in Denver, and deceased lived in Los Angeles, California. He was never legally adopted by either Caspar or Marie. Notwithstanding many allegations and findings as to matters of this character, there is no contention that there is anything alleged or found that would entitle

plaintiff to any relief other than the alleged agreement hereinbefore referred to, and no such contention could reasonably be made. Plaintiff bases his claim, as he must, solely on such agreement.

The facts relating to the agreement, as alleged in the complaint, were substantially as follows: Caspar died testate, leaving an estate amounting in value to about thirty thousand dollars. By his will he gave to plaintiff a one-fourth interest in all his property and estate. Marie Gugolz informed plaintiff that she was dissatisfied with the terms of said will and would contest it, asked plaintiff not to make any objection to such contest, and promised him that if he made no such objection, she would make a will in his favor, leaving him a one-fourth interest in all of the property that she should die possessed of, and that he would lose nothing by refraining from making such opposition. He, having perfect confidence and trust in said aunt and her promise, consented and agreed. She did contest the will, plaintiff made no opposition to said contest, and the will was set aside and denied probate by the court. "If he had made opposition to the contest . . . , he believes that the same would have been sustained," and he would have opposed it but for her promise. The contest went by default, by reason of his failure to oppose the same. It was alleged that such promise was based upon a good, valid and adequate consideration.

The findings of the trial court show, in addition to the above, the following: By the will of Caspar, a life interest in all his property was given to said Marie Gugolz. Subject to such life interest, plaintiff was given one-fourth of the estate, a brother, Edward, in Switzerland, was given one-fourth, one Adolph Aeppli was given one-fourth, and the six children of Gottlieb Aeppli were given one-fourth. Plaintiff and Adolph Aeppli were by the terms of the will made the executors thereof. At the time of the agreement plaintiff had not quite attained the age of majority, but was of full age on the day when the hearing on the application for probate was had. The findings as to the terms of the agreement and the matter of consideration were in accord with the allegations of the complaint.

The answers of defendants sufficiently deny the allegations of the complaint as to the terms of the agreement and the mat-

ter of a good, valid, and adequate consideration, and the findings on these matters are sufficiently attacked by specifications of insufficiency.

The evidence as to the terms of the agreement in so far as they refer to what plaintiff was to do in consideration of the promised act of Marie Gugolz, shows a very different case from that presented by either complaint or findings, and one, we believe, that presents a materially different legal question. Of course, it is naturally to be expected that there would ordinarily be some difficulty in proving just what an oral agreement made more than twenty-five years before was, where there is no written memorandum of any kind to show the conversation relied upon as stating the terms. But here, in the light of the testimony of the plaintiff himself, who gave the only evidence there was as to terms of the agreement, and the evidence as to what was actually done by him in pursuance of the agreement, there can be no question as to just what, in substance, the agreement was.

On the evening of the day on which Caspar Gugolz was buried, December 29 or 30, 1881, Marie Gugolz, and plaintiff, and Adolph Aeppli, who had come from Chicago for the funeral, were together at the residence of Mrs. Gugolz. They read the will, and Mrs. Gugolz expressed her dissatisfaction therewith. She said to them: "If you agree to make no opposition *and to have this will set aside, you and Adolph*, I will, right after it it is defeated, make my will giving you each your quarter after my death. Emil, you can have your quarter, and Adolph shall have your quarter, and the will will be made in the same division as uncle had it." They both agreed, saying, "Yes, we will help you out, and if you will fulfill your promise and make your will the same as uncle had it, *we will help you out in every shape and form.*" The next day they all three went to the office of the lawyer who had drawn the will, and who had acted as one of the subscribing witnesses when it was executed December 18, 1881. This lawyer was told by them that "all three of us agreed together to have it (the will) set aside, and if it can be done to have it done." He told them it would be a "pretty hard matter to do it," but that "of course, with a little scheming . . . it can be accomplished." He directed them to return in a few days. On their return, January 4, 1882, they were taken by the law-

yer before the probate judge, where plaintiff and Adolph Aepli signed a petition for the admission to probate of Caspar's will and the issuance to them of letters testamentary, and were sworn as to the truth of the allegations of the petition by said judge. A few days later the three went to the lawyer's office again, and Marie Gugolz signed a written opposition to the application for probate. On January 25, 1882, the three went with the lawyer to court, together with the lawyer's partner, who acted on the hearing as the attorney for Marie Gugolz. The two subscribing witnesses testified, being questioned only by the attorney appearing for Marie Gugolz. The deposition of the attorney who drew the will shows that the petitioning executors had no attorney on such hearing, did nothing after filing their petition to sustain the will, simply remained quiet at such hearing "and kept close to Mrs. Gugolz," and that "all went the other way by the persuasions, promises, and inducements of Mrs. Gugolz." This was in no way contradicted. When the hearing was completed, the attorney who drew the will, according to the testimony of plaintiff, came over to the three and said to the executors, "I have defeated that will in favor of your aunt." The deposition of this lawyer further shows that Caspar Gugolz was not mentally incompetent to execute a will, and that it was not true that the subscribing witnesses did not subscribe their names in the presence of the testator. Plaintiff himself testified that he was present at the execution of such will; that Caspar Gugolz signed the will in the presence of the subscribing witnesses, and that both subscribing witnesses attached their signatures at the request and in the presence of the deceased, and that he stated it was his will. This uncontradicted testimony covers all the grounds of the contest made. There appears to be no reason to doubt that the will was in fact valid, and that plaintiff knew it to be valid. The record sufficiently shows that none of the other beneficiaries under the will was in Colorado at the time, or knew anything about the proceedings. On January 25, 1882, the alleged will was denied probate, and, as a result, all of the property of Caspar Gugolz was subsequently distributed to Marie Gugolz, as sole heir.

Going back to the language used by plaintiff in his testimony as to the terms of the contract, we see that the propo-

sition made by Marie Gugolz to the two executors was to leave them each one-fourth of her estate if they would agree, not only to make no opposition to her contest, but also "to have this will set aside," and that they in response said that if she would make such a disposition of her property, "we will help you out in every shape and form." This implied not only passive acquiescence in anything she might do in the matter of a contest, but also such active participation on their part, even as executors, as might be essential to bring about the setting aside of the will, and the conduct of the executors thenceforth to the time of the making of the order denying probate of the will clearly shows their understanding that such was the nature of their undertaking. We may concede that the contract as alleged and found cannot be held, in view of the authorities, to be void as against public policy, or to be based upon an illegal consideration. But the contract shown by the evidence is a very different contract from the one alleged and found. The contract shown was one between the executors named in the will on the one hand, and the sole heir of deceased on the other, by which the executors agreed to actually join with such heir in having the will set aside, regardless of its validity and in violation of the rights of the legatees other than themselves, who were entitled under the will to one-half of the estate subject to the life interest of Marie Gugolz, to use the office to which they were appointed by the will to accomplish this result, as executors named in the will to institute a proceeding for its probate and the issuance of letters testamentary to themselves for the sole purpose of enabling the heir to contest the same and to allow such contest to prevail by default on their part, regardless of the merits thereof, all in consideration of the promise on the part of the heir to bequeath to each of them by her last will one-fourth of her estate. This, of course, was, as said by counsel for appellants, not a mere agreement "for relinquishment of a valid right," or "a matter which concerns the parties only." It appears to us that a mere statement of the terms of the real contract is enough to clearly show that the contract is opposed to public policy and is based upon an illegal consideration.

The absence of sound objection on this ground to a contract having for its sole purpose the disposition of property in a

manner different from that proposed by a testator, even where the contract contemplates the rejection of the will when offered for probate, or its setting aside when admitted to probate, when it is entirely free from fraud, and is made by all the parties in interest, may be freely conceded. As has often been substantially said, the public generally has no interest in the matter of the probate of a will, and only those interested in the estate under the will or otherwise are affected by such a contract. If they all agree upon some course to be followed, and their contract is otherwise free from contemplated fraud or violation of any law, no one else has any such interest as warrants complaint. Such was the character of contract involved in *Spangenberg v. Spangenberg*, 19 Cal. App. 439, [126 Pac. 379], especially relied on by plaintiff here, where the contract purported to affect only such property of the deceased as should in fact be received by the parties thereto. In *Estate of Garcelon*, 104 Cal. 570, [43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414], another case much relied on by plaintiff, a contract by an heir to refrain from contesting a will was involved. It was said that the contract was one that concerned the parties alone, and one that did not appear to be against public policy. The contract here involved concerned not only the parties thereto, but also all the other legatees under the will of Caspar Gugolz, none of whom, the record sufficiently shows, was present or had any actual notice of what was being done. Such other legatees were all entitled, if the will stood, to receive the amounts given them, subject to the life interest given to Marie Gugolz. This interest given them was free from any power of disposition on the part of said Marie Gugolz. The setting aside of the will involved the absolute destruction of this right conferred on them thereby, and the vesting of the whole of their interest in Marie Gugolz, to do with as she saw fit. The purpose and effect of the contract were to accomplish this very result, to prevent the probate of the will in order to defeat the rights of the legatees thereunder, not, it may be conceded, merely to so deprive such legatees of their rights, but for the purpose of enabling Marie Gugolz to have all of the property, with absolute power of disposition. The only undertaking of Marie Gugolz was to leave such property as she possessed at the time of her death to the legatees named in her hus-

band's will, in the proportions specified therein. In addition to this, the contract contemplated, and in its execution involved, not the mere omission of the executors named in the will to take any step looking to the defense thereof, but their active co-operation as executors in so presenting the matter to the court as to bring about the invalidation of the will, regardless of whether or not there was any legal objection thereto. We think no case can be found in which such a contract has been held to be valid. It has been expressly held that an agreement to resist the probate of a will and procure it to be set aside so as to cut off the interest of one who is not a party to the agreement is against public policy, it being said that the object of such a contract was against public policy as tending to thwart justice. (See *Gray v. McReynolds*, 65 Iowa, 461, [54 Am. Rep. 16, 21 N. W. 777].) In *Cochran v. Zachery*, 137 Iowa, 585, [126 Am. St. Rep. 307, 15 Ann. Cas. 297, 16 L. R. A. (N. S.) 235, 15 N. W. 486], the heirs of the testator, who were given a life interest by the will, with remainder over to their issue, in order to obtain a fee simple title, agreed with the person named as executor to pay him two thousand dollars in lieu of the compensation he would be entitled to as executor and trustee if the provisions of the will should be carried out, if he, acting in conjunction with them, should secure the setting aside of the will of deceased. The executor did not even petition for the probate of the will, such petition being presented by the guardian of one of the heirs. The will was denied probate, on the contest made thereto. The question of the executor's right to recover the two thousand dollars agreed to be paid him was presented, and the contract was held to be against public policy, and recovery thereon was denied. It was said that by the contemplated adjudication that the will was not valid, the rights of the issue entitled to the remainder were to be absolutely defeated, and, citing *Gray v. McReynolds*, 65 Iowa, 461, [54 Am. Rep. 16, 21 N. W. 777], that such an agreement to cut off the interest of one who is not a party is against public policy. It was further held that the agreement there involved was against public policy in that it contemplated the violation by defendant of the trust reposed in him by his father in naming him as an executor to carry out the provisions of the will, although he had not assumed any obligation as such, the

court saying that it believed it to be in violation of public policy that he should speculate on the advantages which would accrue to him as executor and trustee, should the will be admitted to probate, and make the relinquishment of those advantages the consideration for an agreement to secure a pecuniary consideration. It was further said that any contract which involves a fraud on the rights of others is against public policy. In *Ridenbaugh v. Young*, 145 Mo. 274, [46 S. W. 959], the agreement of one heir to pay another ten thousand dollars if a proceeding for the setting aside of the will of the deceased instituted by the promisor should be successful and the will set aside was involved. The effect of such a conclusion of the proceeding was to cut off the rights of a devisee who was not a party to the agreement. It was said that under the facts appearing, the contract was entered into by two apparent adversary parties without the consent of a codefendant of one of them, and that the participating defendant was to be paid a money consideration by the contestant if he was successful. It was said by the court that the contract showed that it was entered into for the purpose of defrauding the devisee not a party to the agreement, and of imposing upon the court, under the pretense by the promisee that she was acting in concert with her codefendant in resisting the suit to set aside the will, while at the same time she was conniving with the plaintiff to bring about a different result, for all of which she was to receive a consideration. It is to be noted that by the agreement there involved, the contestant agreed with the promisee to transfer to the devisee who was not a party, all his interest in certain lands devised by the will to such devisee, thus making a promise for his benefit, just as in the case at bar Marie Gugolz made such a promise for the benefit of those not parties to the agreement between herself and the executors. What was said by the supreme court of Missouri as to the contract involved in the case referred to, as stated above, is applicable here. The contract here, by the very terms, was a fraud upon the other legatees, and must be held to have been entered into for the purpose of defrauding them. It further must be held to have contemplated an imposition upon the probate court, the inauguration of a proceeding in which the parties appearing were to be apparently adversary, while in fact they were all actively

engaged in seeking the same result, the setting aside of the will of deceased, as invalid, absolutely without regard to the merits of the contest. Of the agreement involved in the case referred to, the supreme court of Missouri said: "If such an agreement is not inconsistent with the full and impartial course of justice, then we are at a loss to know what is. It was not only a fraud upon one of the parties to the suit, but it was an imposition on the court, its general tendencies fraudulent and against public policy. No such contract can or should be enforced; it is at war with honesty of purpose and the correct and fair administration of justice. In such circumstances the law will leave the parties where it finds them." It is said in the note to *Cochran v. Zachery*, 16 L. R. A. (N. S.) 237, that where the contract is not made by all the parties in interest, and the purpose and effect of it are to prevent or defeat the probate of a will, thereby to defeat the rights of certain legatees or devisees therein, not parties thereto, the courts passing upon the question are unanimous in holding it violative of public policy and void. We have found no reason to doubt the correctness of this statement. So far as the obligation of one named as executor in a will to *oppose* a contest is concerned, the statements in *Estate of Hite*, 155 Cal. 455, [101 Pac. 448], and *Estate of Higgins*, 158 Cal. 356, [111 Pac. 8], relied upon by learned counsel for plaintiff, correctly declare the law as it exists in this state. But there is nothing in either of these cases which countenances the willful use by such person of the rights accruing from the fact that he is named as executor to carry out the provisions of the will, for the purpose of overthrowing it and having it declared null and void. As suggested in a somewhat similar case, to approve such action would be to approve a continuance in his trust by an executor, for the very purpose apparently of better betraying it. (See *Miller's Appeal*, 30 Pa. St. 478; *Wilhelm's Appeal*, 30 Pa. St. 495.) We are satisfied that such a contract as is shown by the evidence should be held to be against public policy and based on an unlawful consideration.

It appears from what we have said that the difference between the contract shown by the evidence and the contract found by the trial court is material to such an extent as to require the conclusion that the findings in regard to the terms

of the contract are not sustained by the evidence. It also appears from what we have said that the finding of the trial court to the effect that the promise of Marie Gugolz to plaintiff was based upon a good, valid, and adequate consideration is not supported by the evidence.

It is earnestly urged that the parties to this agreement were not *in pari delicto*, and that the plaintiff should be allowed to enforce the same in equity, notwithstanding there may be well founded objections thereto on the ground of public policy and illegality of consideration. Of course, the complaint was not drawn upon any such theory. The theory of the complaint was that the contract was in all respects valid, and no attempt was made to allege facts showing that plaintiff was entitled to relief upon any other theory. It was incidentally alleged that plaintiff was then a minor, and that Marie Gugolz was as a mother to him and had a mother's influence over him. But it was alleged that "if he had made opposition to the contest . . . he believes that the same would have been sustained, and . . . that if it had not been for the promise of his said aunt that she would provide for him in the same manner in her will, that he would have opposed the said contest on her part, of the said last will of the said Caspar Gugolz," and "that the said contest went by default on the part of plaintiff, by reason of the said promise made to him by his said aunt." The trial court found, outside of any issue made by the pleadings, that at the date of said promise and agreement said plaintiff was inexperienced and ignorant as to the law, law courts, and court procedure, and in making said promise said plaintiff was controlled and influenced by his said aunt. There is nothing in the evidence contained in the record now before us to indicate on the part of Marie Gugolz, anything in the nature of oppression, duress, threats, undue influence, or the taking advantage of necessities, weaknesses, and the like, as a means of inducing plaintiff to enter into this contract. Apparently what he did was done in all respects freely and voluntarily. He was twenty-one years of age on the day the hearing was had in the Colorado probate court, and so far as appears was fully as conversant with law, law courts, and court procedure as was Marie Gugolz, if not a great deal more so. Eliminating the finding that may be claimed to tend to show undue influence on the part of Marie

Gugolz,—namely, the finding that plaintiff was controlled and influenced by his said aunt, and the further finding as to plaintiff's ignorance of the law, etc., it is manifest that the judgment cannot be sustained upon the theory that the contract, although void as being against public policy and based upon an illegal consideration, may nevertheless be enforced by plaintiff, or that some relief may be granted on account thereof, because he was not *in pari delicto* with Marie Gugolz. The findings, in so far as they are sufficiently sustained by evidence, obviously do not present such a case as may properly be held to be within any exception to the general rule that neither party to such a contract will be granted relief by the courts, and that the law leaves such parties where it finds them. The exceptions to such rule, based on the theory that the parties are not *in pari delicto*, are well stated in a general way in section 942 of Pomeroy's Equity Jurisprudence, third edition. Certainly such findings in the case at bar as are sufficiently sustained by the evidence do not bring this case within any of the exceptions to the general rule.

The fact that certain material findings are not sufficiently sustained by the evidence makes a reversal necessary.

The judgment and order denying a new trial are reversed.

Henshaw, J., Melvin, J., Sloss J., Shaw, J., and Lorigan, J., concurred.

[Sac. No. 1979. Department One.—January 25, 1913.]

CHARLES P. NATHAN, Respondent, v. EDA B. DIERSSEN, as Executrix of the Last Will and Testament of George E. Dierssen, Deceased, Appellant.

EJECTMENT—MESNE PROFITS—JOINDER OF CLAIMS IN ONE ACTION.—

Whatever may be the right in this state of one out of possession of land to sue for mesne profits alone without setting up possession or the recovery of judgment in ejectment, section 427 of the Code of Civil Procedure authorizes a plaintiff unlawfully dispossessed to unite in the same action a claim "to recover specific real property,"

with one for "damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same."

ID.—DEMAND FOR MESNE PROFITS WITHOUT PRIOR POSSESSION OR JUDGMENT IN EJECTMENT.—Under that section, a demand for mesne profits may be enforced without prior possession or judgment in ejectment when the demand is made in the very action of ejectment itself.

ID.—ACTION FOR MESNE PROFITS—ALLEGATIONS SHOWING RIGHT OF POSSESSION—ANSWER—JUDGMENT.—Where a complaint alleges the ownership of land in the plaintiff, that the defendant wrongfully entered and dispossessed him and that he still keeps him out of possession, and also facts essential to a demand for rents and profits, but without praying for restitution of the premises, and the answer takes issue thereon, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issues, and the action may properly be regarded as one for the recovery of possession, as well as for rents and profits.

ID.—RESTITUTION OF POSSESSION PENDING ACTION—JUDGMENT FOR MESNE PROFITS.—In such action, the fact that the plaintiff came into possession of the premises after the commencement of the action did not deprive him of his right to a judgment for mesne profits. Such a judgment may be rendered, without a judgment for restitution, or findings establishing the plaintiff's right to restitution.

ID.—DAMAGES—INTEREST ON MESNE PROFITS.—The plaintiff is entitled to recover in such action interest on the amount found to be the value of the rents, issues, and profits, from the date of the restitution of the possession to the date of the judgment.

ID.—EVIDENCE OF DAMAGES—RENTAL VALUE.—The damages in such an action may be established either by showing the rents and profits actually received or by proving the rental value of the land.

ID.—FAILURE TO BRING ACTION TO TRIAL FOR FIVE YEARS—STIPULATION FOR DELAY—DISMISSAL.—Under section 583 of the Code of Civil Procedure, the failure to bring an action to trial within five years after the answer had been filed will not necessitate its dismissal, if the parties had stipulated in writing for the extension.

ID.—JUDGMENT AGAINST ESTATE—PAYABLE IN COURSE OF ADMINISTRATION.—A judgment for mesne profits against the estate of a deceased person should be made payable in due course of administration.

APPEAL from a judgment of the Superior Court of Yolo County and from an order refusing a new trial. N. A. Hawkins, Judge.

The facts are stated in the opinion of the court.

Devlin & Devlin, for Appellant.

D. E. Alexander, and White, Miller & McLaughlin, for Respondent.

SLOSS, J.—The action was brought by Charles P. Nathan against George E. Dierssen to recover the rents, issues, and profits of a tract of land in Yolo County, alleged to have been unlawfully withheld from plaintiff by defendant. Pending the action the original defendant died and Eda B. Dierssen, as executrix of his last will, was substituted in his stead. A supplemental complaint alleged the presentation of a claim by the plaintiff to the executrix. Upon a trial without a jury, the court rendered judgment in favor of the plaintiff for \$2,592.75, and from this judgment and an order denying her motion for a new trial the defendant appeals.

The present action was commenced in May, 1902. It appears from the bill of exceptions that in July, 1898, the plaintiff Nathan had commenced a former action against Dierssen and another to quiet his title to the land in question, and for restitution of the possession thereof, and that on April 22, 1902, a judgment in accordance with plaintiff's prayer had been entered in said action. An appeal was taken to this court, and the judgment was affirmed on the twenty-third day of February, 1905. (*Nathan v. Dierssen*, 146 Cal. 63, [79 Pac. 739].) It appeared further, that pending said appeal, to wit, on November 1, 1902, Dierssen surrendered possession of the premises to the plaintiff. Such surrender, it will be noted, took place after the commencement of the present action.

The appellant contends that, under this state of facts, the plaintiff was not entitled to maintain an action for rents and profits, for the reason that he was not, at the date of the filing of his complaint, in possession of the land. It was without doubt the established rule at common law that an action against a wrongful disseisor for mesne profits could not be maintained except by a plaintiff who had regained actual possession of the premises (15 Cyc. 213, 215; *Stancill v. Calvert*, 63 N. C. 616; *Caldwell v. Walters*, 22 Pa. St. 378; *Ainslie v. Mayor of New York*, 1 Barb. 168; *Alt v. Gray*, 55 App. Div. 563, [67 N. Y. Supp. 411]; *Young v. Downey*, 145 Mo. 261,

[46 S. W. 962]), or, at least, had recovered a judgment in ejectment. (*Shipley v. Alexander*, 3 Har. & J. (Md.) 84, [5 Am. Dec. 421]; *Brewer v. Beckwith*, 35 Miss. 467; *Winkley v. Hill*, 6 N. H. 391; see *Locke v. Peters*, 65 Cal. 161, [3 Pac. 657].) As we have seen, the plaintiff did not have actual possession. And, even a holding that the rule is satisfied by a prior recovery of judgment for possession would not avail plaintiff here, since the complaint fails to allege, and the findings to state, that there had been any recovery in ejectment.

The position of the respondent is, however, that the doctrine requiring a plaintiff before suing for mesne profits, to retake possession or to establish his right of possession by a judgment in ejectment has been abolished by the provisions of our codes, and that, in this state, the action may be maintained by any one who has wrongfully been kept out of a possession to which he was entitled. It is unnecessary to pass upon the merits of this broad contention. Whatever may be the right of one out of possession to sue for mesne profits alone without setting up possession or the recovery of judgment in ejectment, section 427 of the Code of Civil Procedure unquestionably authorizes a plaintiff unlawfully dispossessed to unite in one and the same action a claim "to recover specific real property" with one for "damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same." The appellant concedes that under this section, a demand for mesne profits may be enforced without prior possession or judgment in ejectment when the demand is made in the very action of ejectment itself.

We think the present action may properly be regarded as one for the recovery of possession, as well as for rents and profits, and that it therefore comes within the permissive provision of section 427. The complaint contains every allegation necessary in an action of ejectment. It alleges ownership in plaintiff, that defendant wrongfully entered and dispossessed him and that he still keeps him out of possession. No further averment was required. (*Payne v. Treadwell*, 16 Cal. 220; *Salmon v. Symonds*, 24 Cal. 261; *Johnson v. Vance*, 86 Cal. 128 [24 Pac. 683]; *F. A. Hihn Co. v. Fleckner*, 106 Cal. 95, [39 Pac. 214].) There was, therefore, a statement of every fact necessary to entitle the plaintiff to a

judgment for possession of the premises, together with the facts essential to a demand for rents and profits. It is true that the complaint contains no prayer for the restitution of the premises. If the defendant had defaulted, judgment for such possession could not properly have been rendered. But when an answer has been filed and issues raised, the court may grant plaintiff any relief "consistent with the case made by the complaint and embraced within the issue." (Code Civ. Proc., sec. 580; *Walsh v. McKeen*, 75 Cal. 519, [17 Pac. 673]; *Johnson v. Polhemus*, 99 Cal. 240, [33 Pac. 908]; *Kent v. Williams*, 146 Cal. 3, 11, [79 Pac. 527]; *Zellerbach v. Allenberg*, 99 Cal. 57, [33 Pac. 786].) The moment the answer was filed, therefore, the case became one in which the court, regardless of the prayer of the complaint, would have been authorized to grant any relief consistent with the plaintiff's averments. Such relief could properly have included a judgment for the restitution of the possession with the recovery of the rents and profits. (*Evans v. Schafer*, 119 Ind. 49, [21 N. E. 448].)

The fact that no judgment for restitution was in fact given is of no consequence. There was no occasion for any such judgment in view of the fact that during the pendency of the action possession had been restored to the plaintiff. For the same reason the court was not required to make findings establishing the plaintiff's right to a restitution of possession. If the action was one in which, under the issues framed, a judgment for restitution and rents and profits might properly have been rendered, the fact that the plaintiff came into possession of the premises after the commencement of the action did not deprive him of his right to a judgment for mesne profits. (*Crispen v. Hannovan*, 86 Mo. 160; *McChesney v. Wainwright*, 5 Ohio, 452; *Venner v. Underwood*, 1 Root (Conn.) 73; *Price v. Sanderson*, 18 N. J. L. 426.)

The findings declared that the value of the rents, issues, and profits of the premises during the period of the withholding was \$1,733.33. The court further found that the plaintiff was entitled to interest on this amount from the first day of November, 1902, the date of the restitution of the possession, to the date of judgment. The appellant contends that the allowance of interest was not justified. But the contrary has been directly held by this court. In *Furlong v. Cooney*, 72

Cal. 322, [14 Pac. 12], the court, in defining the measure of damages in a case like this, states that "interest also may be allowed when necessary to a complete indemnity."

We see no error in allowing evidence to show the rental value of the property. The appellant concedes that the damage in cases of this kind may be established either by showing the rents and profits actually received or by proving the annual rental value of the land. The latter course was the one followed here, and we think the testimony offered by plaintiff fairly tended to show the reasonable rental value. The answers of some witnesses with respect to this point are criticised, but the objections go rather to the weight of their testimony than to its admissibility.

The answer was filed June 19, 1902. The case was not tried until June 15, 1909. The defendant moved to dismiss the action upon the ground that five years had elapsed after the filing of defendant's answer. But section 583 of the Code of Civil Procedure, which directs a dismissal where there has been such delay, makes an exception of cases where "the parties have stipulated in writing that the time may be extended." There was ample evidence here to justify the court in holding that stipulations to this effect had been made. There was no error in denying the motion.

Finally, the appellant contends that the judgment, being against the executrix upon a demand against the estate of her testator, should have been made payable in due course of administration. (Code Civ. Proc., sec. 1504.) This contention seems to be well founded, and the judgment will be modified accordingly.

The judgment is modified by adding thereto, after the words "as executrix of the last will and testament of George E. Dierssen," the words "the same to be paid in due course of administration of the estate of said decedent," and as so modified the judgment is affirmed.

The order denying a new trial is affirmed.

Shaw, J., and Angellotti, J., concurred.

Hearing in Bank denied.

[S. F. No. 5971. Department One.—January 27, 1913.]

**JOSE REALTY COMPANY (a Corporation), Respondent,
v. V. PAVLICEVICH, Appellant.**

QUIETING TITLE—DEFENSE OF PURCHASE AT TRUSTEE'S SALE UNDER DEED OF TRUST—EVIDENCE OF FRAUD IN SALE ADMISSIBLE WITHOUT BEING PLEADED.—In an action to quiet title to land, in which the defendant by his answer sets up title through a sale by a trustee under a deed of trust, executed by the plaintiff's predecessor in interest, the plaintiff, in avoidance of such defense, may offer evidence to show that the trustee's sale and deed made in pursuance thereof were invalid by reason of fraud, without pleading the fraud in his complaint.

ID.—FRAUDULENT SALE BY TRUSTEE—ABSENCE OF DEFAULT IN PAYING INTEREST—NEW TRIAL—FINDING—SPECIFICATIONS OF INSUFFICIENCY OF EVIDENCE.—In such action, where the court in effect found that the plaintiff was the owner of the land subject to such deed of trust, and that the attempted trustee's sale for default in the payment of interest on the note secured by the trust deed was void because the payer of such note had had sufficient funds at the place of payment for the purpose of paying such interest, specifications in the notice of intention to move for a new trial on the minutes of the court, that the evidence was insufficient to justify the findings (1) that plaintiff is the owner of the premises, (2) "that the interest which defendant has in the premises is without right," and (3) "that the money for the payment of the interest on said note was at all times ready at the place of payment," are sufficient to present the question whether or not the finding on the subject of the default in the interest payments is sustained by the evidence.

ID.—RECITAL OF DEFAULT IN TRUSTEE'S DEED—CONCLUSIVENESS IN ABSENCE OF FRAUD.—A recital in a deed executed by a trustee in pursuance of a sale by him under a deed of trust given to secure the payment of a note, that the payer of the note was in default at the time of sale, is conclusive on the trustor and his successors in interest, where the deed of trust empowers the trustee to make it, in the absence of fraud of which the purchaser at the trustee's sale had notice.

ID.—SALE BY TRUSTEE IN ABSENCE OF DEFAULT—KNOWLEDGE BY PURCHASER—FRAUDULENT SALE—EVIDENCE INSUFFICIENT TO ESTABLISH FRAUD.—The facts that the payee of the note, knowing that there had been no such default, declared the principal and interest due and caused the trustee to make a sale under the power by falsely informing him that the payer was in default, and that the payee himself bought in the property at the trustee's sale, and that the

owners of the property were not informed of the sale or of the notice given thereof and had no knowledge of it, would be sufficient to avoid the trustee's sale and deed. It is held, however, that the evidence is insufficient to show that the payer of the note was not in default in the payment of interest, and that the payee knew he was not in default.

ID.—DEMAND FOR PAYMENT OF NOTE.—DEFAULT IN PAYMENT.—Under section 3130 of the Civil Code, no demand of payment upon the payer of a promissory note is necessary in order to create a default in payment.

ID.—NEGOTIABLE INSTRUMENT PAYABLE AT SPECIFIED PLACE—ABILITY AND WILLINGNESS TO PAY—EQUIVALENT TO OFFER OF PAYMENT—FUNDS FOR PAYMENT ESSENTIAL.—The provision of section 3130 of the Civil Code, to the effect that if a negotiable instrument is by its terms payable at a specified place, and the principal debtor thereon is able and willing to pay it there at maturity, such ability and willingness are equivalent to an offer of payment upon his part, cannot be complied with by a mere passive ability and willingness. There must be an ability to pay manifested by providing funds at the place of payment in the hands of some person there present who is authorized to pay it on the debt and is willing to do so.

ID.—INSUFFICIENT EVIDENCE OF ABILITY AND WILLINGNESS TO PAY.—Where a promissory note is made payable at the office of a specified person, mere evidence that such person, or some other person in his office, had money enough to pay the interest on the note at any time had it been demanded, without any showing that the money belonged to the payer of the note, or had been provided or placed there by him, or any other person, for the purpose of paying the interest, or that the proprietor of the office, or any other person there, was willing to pay it out on the interest, or had been authorized or instructed to do so, or that any of them intended to do so if the interest had been demanded, is insufficient to establish the equivalent of an offer to pay the interest, under section 3130 of the Civil Code.

APPEAL from a judgment of the Superior Court of Santa Clara County from an order refusing to vacate the judgment, and to enter judgment for the defendant on the findings, and from an order refusing a new trial. John E. Richards, Judge.

The facts are stated in the opinion of the court.

W. B. Hardy, and Charles Clark, for Appellant.

Will M. Beggs, and R. C. McComish, for Respondent.

SHAW, J.—The defendant presents three appeals: One from the judgment, a second from a ruling refusing to vacate the judgment for plaintiff and enter judgment for defendant on the findings, and a third from an order denying defendant's motion for a new trial. It will be necessary to consider only the appeal from the order denying a new trial.

The plaintiff's action was to quiet its alleged title to a parcel of land, the complaint being in the usual form, alleging ownership in plaintiff and an unfounded claim by the defendant. The proof showed that on November 30, 1909, one J. A. Cottle, being then the owner of the land subject to a deed of trust by him previously made, conveyed it to one A. E. House and that, on September 21, 1910, said House executed a deed purporting to convey the land to the plaintiff.

The defendant, for answer, alleged that on November 30, 1909, Cottle executed a deed conveying the land to a trustee with power of sale, to hold the same as security for the payment of a note from Cottle to Pavlicevich, dated October 18, 1909, payable one year after date, for three thousand three hundred dollars, with interest at seven per cent per year, payable monthly, and providing that if the interest was not so paid the payee might declare the whole sum due, of which declaration the maker waived notice; that no interest was paid for the months of May, June, July, or August, 1910, whereupon the defendant declared the whole sum due and the trustee, at defendant's written request, and in the manner prescribed by the terms of the power of sale, offered the land for sale for nonpayment of debt, sold it to Pavlicevich and in pursuance thereof, on September 20, 1910, conveyed the land to Pavlicevich by deed which was duly recorded on the same day, whereby defendant became the owner of the premises.

The note declared that it was payable at the office of Will M. Beggs, in San Jose. The deed to the trustee provided that, in any deed made by the trustee under the power of sale, the recital in such deed of any matter of fact, including the fact that default had been made in the payment of the note or interest thereon when due, should be conclusive proof of such fact against Cottle, his heirs and assigns. The deed executed by the trustee to Pavlicevich recited that the interest on said note was on August 24, 1910, overdue and unpaid and that Pavlicevich had elected to consider the principal as

immediately due and payable and had directed the trustee to proceed and that the first publication of the notice of sale was on August 25, 1910.

The plaintiff, on the trial, did not controvert any of these statements, except the statement that the interest on the note, or any part of it, was overdue at or prior to the giving of said notice of sale. Its contention is that it had bought the title of Cottle and had assumed the payment of the note, that it was able and willing to pay it at the office of Beggs at the time the respective monthly payments became due and, consequently, that under the provisions of section 3130 of the Civil Code it was not in default. It also claimed that the trustee's sale was fraudulently procured by Pavlicevich, the fraud consisting of his conduct in giving the direction to the trustee to sell the land for default in payment of interest, when, by reason of plaintiff's ability and willingness to pay the interest at the time it fell due at the place of payment, there was no default.

It was not necessary for plaintiff to plead fraud in its complaint. The trustee's sale was set up by the defendant as a defense to the action of the plaintiff. In such a case proof of fraud sufficient to avoid the trustee's sale and deed was admissible without further pleading, it being matter in avoidance of the defense set up in the answer. (*Moore v. Copp*, 119 Cal. 433, [51 Pac. 630]; *Brooks v. Johnson*, 122 Cal. 570, [55 Pac. 423]; *White v. Stevenson*, 144 Cal. 112, [77 Pac. 828]; *Wendling Co. v. Glenwood Co.*, 153 Cal. 415, [95 Pac. 1029]; *Peck v. Noe*, 154 Cal. 354, [97 Pac. 865].)

The court found that no interest was ever paid on the note for any month after April, 1910, but that at all times since that date "the payer of said note has had sufficient funds at said office for the purpose of paying said interest," and that the defendant had never demanded the payment of said interest. Upon this finding it made a conclusion of law that there was no default in the payment of interest and that the declaration by Pavlicevich that the principal was due, and the sale and deed made in pursuance thereof, were fraudulent and void. There was also a general finding that the plaintiff was the owner of the land, subject to the deed of trust executed by Cottle, and that the interest which the defendant

claims, in addition to the rights conferred by said deed of trust, is without right.

The defendant gave notice of intention to move for a new trial, stating that the motion was to be made on the minutes of the court. The notice in effect specified that the evidence was insufficient to justify the following findings: 1. That plaintiff is the owner of the premises; 2. "That the interest which defendant has in the premises is without right"; 3. "That the money for the payment of the interest on said note was at all times ready at the place of payment." Although these are not in the customary form for such specifications of insufficiency, we think they are sufficient to present the question whether or not the finding on the subject of the default in the interest payments is sustained by the evidence.

If the recital in the trustee's deed is conclusive on Cottle and his successors in interest, it would follow that this finding is contrary to the evidence. That such recital is conclusive, where the deed of trust empowers the trustee to make it, in the absence of fraud of which the purchaser at the trustee's sale had notice, appears to be settled by the decisions of this court. (*Simson v. Eckstein*, 22 Cal. 593; *Carey v. Brown*, 62 Cal. 374; *Mersfelder v. Spring*, 139 Cal. 595, [73 Pac. 542.]) Respondent, however, claims that by showing that Pavlicevich, knowing that there had been no such default, declared the principal and interest due and caused the trustee to make a sale under the power by falsely informing him that the payer was in default, and that Pavlicevich himself bought the property at the trustee's sale, and that the owners of the property were not informed of the sale or of the notice given thereof and had no knowledge of it, it has established the proposition that the sale and deed were procured by fraud, and that this is sufficient to let in proof of the falsity of the recital in the deed of the trustee and set aside the sale made by him. We are of the opinion that if these facts were shown the fraud claimed would be sufficiently established. But we think the proof was lacking so far as the facts of there having been no default in payment of interest and of knowledge by Pavlicevich are concerned.

It is admitted that the interest for the four months above specified has never been paid. It is not claimed that Pavlicevich knew, or ever was informed, that the plaintiff, or any

other person, had funds in the hands of Beggs, or with any other person at his office or elsewhere, with which to pay the interest, or that any money had been placed there for that purpose. Pavlicevich testified that the loan to Cottle was made for him through the agency of Beggs, to whom he had intrusted the money for that purpose, that he demanded from Beggs in his office, about the first of June, 1910, the payment of the interest due on May 18, 1910, and that during the months of May, June, July, and August, 1910, he went repeatedly to Beggs's office to collect the interest, but failed to get it, and that Beggs never offered to pay it. This, clearly, was ample evidence of the existence of a default. In rebuttal Beggs testified that he was the president of the Jose Realty Company, and that, in February, 1910, he told Pavlicevich that said company had succeeded to the interest of Cottle in the property, and was to look after the payment of the note and interest. He further testified that he had advanced \$8.50 for Pavlicevich to pay costs in a justice court suit, in which he was attorney for Pavlicevich, and that Pavlicevich, in January, 1910, agreed that this advance might be adjusted the next time the interest fell due on the note, that no interest was paid from that time until May 5th, when he paid to Pavlicevich \$57.75, being interest for three months ending April 18th, that the \$8.50 was not then adjusted or deducted; that Pavlicevich, shortly afterward, asked Beggs to find a purchaser for the note, saying that he needed the money, that Beggs tried to do this and that there were several conversations between them about it and that Pavlicevich never demanded payment of the interest from him, or from anybody else in his presence, or to his knowledge. There is no testimony that any person ever offered to pay such interest. Beggs was then asked the question: "Did you have funds at your office, or had any of the persons in charge of your office, sufficient to pay the interest at any time had it been demanded," to which he answered: "Yes, sir." This was all the evidence tending to show that the plaintiff was able and willing to pay the interest at the office of Beggs.

The purpose of this evidence was to bring the case within the provisions of section 3130 of the Civil Code, which reads as follows: "It is not necessary to make a demand of payment upon the principal debtor in a negotiable instrument in order

to charge him; but if the instrument is by its terms payable at a specified place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to an offer of payment upon his part." Under this section no demand was necessary in order to create a default in payment. The latter clause of the section manifestly refers to section 1500 of the Civil Code, which provides that, "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor." Under this section it has been uniformly held that although such an offer, when not followed by an immediate deposit, does not pay the debt, or extinguish the obligation to pay it, yet if the mere offer is duly made, the effect is that there is at that time no breach of the promise to pay. (*Randol v. Tatum*, 98 Cal. 399, [33 Pac. 433]; *O'Connor v. Braly*, 112 Cal. 37, [53 Am. St. Rep. 155, 44 Pac. 305]; *Knowles v. Murphy*, 107 Cal. 115, [40 Pac. 111]; *Wolff & Co. v. Canadian Pac. R. R. Co.*, 123 Cal. 543, [56 Pac. 543]; *Montgomery v. Tutt*, 11 Cal. 318, 327.) Section 3130, of course, cannot be complied with by a mere passive ability and willingness. There must be an ability to pay manifested by providing funds at the place of payment in the hands of some person there present who is authorized to pay it on the debt and is willing to do so. If, therefore, the plaintiff had placed sufficient money in the office of Beggs, to be applied to the payment of this interest, in charge of some person there who was authorized and directed to use it for that purpose when demand was there made, or if it had been in attendance there by its agent with sufficient money and authority to pay such interest, and had been able and willing thereafter to pay it on demand, it would not have been in default for nonpayment of interest, although the obligation to pay it would remain. (*Montgomery v. Tutt*, 11 Cal. 318.)

But the evidence does not show this to be the case. It merely shows that Beggs, or some other person in his office, had money enough to pay the interest at any time had it been demanded. It does not show that the money belonged to the plaintiff, or that it had been provided or placed there by the plaintiff, or any other person, for the purpose of paying this

interest, or that Beggs, or that any other person in his office, was willing to pay it out on the interest, or had been authorized or instructed to do so, or that any of them intended to do so if the interest had been demanded. There was, therefore, no proof that "the *payer* of said note has had sufficient funds at said office" to pay the interest, or that the payer had sufficient or any funds there "for the *purpose* of paying said interest" as the findings declare, or that the payer was "able and willing to pay it there," in the sense necessary to constitute the equivalent of an offer to pay under section 3130 aforesaid. The proof in rebuttal was not sufficient to overcome the positive proof of the defendant that the interest was not paid when due.

The judgment is vacated and the order denying a new trial is reversed.

Angellotti, J., and Sloss, J., concurred.

Hearing in Bank denied.

[S. F. No. 6101. Department One.—January 27, 1913.]

J. H. VAN HORNE, Appellant, v. IVAN G. TREADWELL
and E. L. REESE, Respondents.

PLEDGE—REFUSAL TO RETURN PROPERTY—SINGLE CAUSE OF ACTION—JUDGMENT FOR RETURN—BAR TO SUBSEQUENT ACTION FOR DAMAGES—The wrongful refusal of a pledgee to redeliver the pledged property creates but a single cause of action in favor of the pledgor, and a judgment in his favor in an action for the return of such property is a bar to a subsequent action to recover damages for wrongfully withholding its possession, or for the repayment of attorney's fees incurred in the prior action.

ID.—DEPRECIATION IN VALUE OF PROPERTY DURING LITIGATION.—The continued withholding of stocks and bonds after the bringing of action to enforce their delivery, pending the litigation and up to the time of the enforcement of the decree, is not a new wrong redressible by a new action, but is simply a continuation of the original wrong for which the only redress given by the law must be had in the original action, and consequently a second action will not

lie for the damage due to depreciation in the value of the stocks or bonds occurring between the time of the commencement of the first action and the determination of such action on appeal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

L. S. Melsted, and Edwin H. Williams, for Appellant.

H. H. McPike, and Crittenden Thornton, for Respondents.

SLOSS, J.—The court below sustained demurrers to the complaint, granting plaintiff leave to amend. No amendment having been filed within the time allowed, judgment was entered in favor of the defendants. The plaintiff appeals.

The complaint alleges the following facts: On June 30, 1910, plaintiff, who was then and has ever since been the owner of three thousand five hundred shares of the capital stock of the Sutter Hotel Company, pledged said shares to defendant Reese to secure the payment of a loan of two thousand dollars. In February, 1911, plaintiff, with Reese's consent, pledged said shares to defendant Treadwell to secure an advance of four thousand three hundred and fifty dollars made by Treadwell to plaintiff. It was agreed that out of the sum so advanced, Reese's loan should be repaid. This was done, plaintiff executing a note to Treadwell for four thousand three hundred and fifty dollars, and Reese turning over the stock to Treadwell upon receiving from the latter repayment of the two thousand dollar loan with interest. On March 26, 1911, plaintiff tendered to Treadwell payment of the full amount due upon the note, but Treadwell refused to accept said payment or to deliver the pledged stock. On March 31, 1911, plaintiff brought an action against the defendants to recover said stock, and tendered into court the sum of four thousand five hundred dollars in payment of all indebtedness due from plaintiff to Treadwell. On June 16, 1911, plaintiff recovered judgment in said action against defendants for the return of said three thousand five hundred shares of stock, and on June 19, 1911, Treadwell actually delivered the stock to plaintiff.

It is further alleged that on March 26, 1911, the day of the tender to Treadwell, plaintiff had received an offer of seven thousand five hundred dollars for said stock, "and was ready able and willing to sell said stock for said sum of \$7,500." On the nineteenth day of June, 1911, and at all times subsequent to the sixteenth day of June, 1911, the value of the stock was four thousand five hundred dollars and no more. In the action to recover possession of the stock plaintiff was compelled to and did expend one thousand five hundred dollars in the pursuit of the property, i. e., in payment of attorney's fees. The complaint prays judgment for four thousand five hundred dollars.

So far as the plaintiff's demand is based upon the depreciation in the value of the stock, it is apparent that the action seeks to claim damages for the wrongful act of the defendants in withholding possession of the property which had already been regained by means of the former action. Such damages cannot be recovered for the simple reason that the plaintiff's right to them should have been litigated in the former action. The judgment there rendered was a conclusive adjudication of all matters, arising out of the withholding of the stock, which might have been presented to the court for determination. Whether we regard the first action as one in claim and delivery, or as a suit in equity for specific performance of the agreement to return pledged property on payment of the debt (in other words, a bill to redeem) there can be no question that in that action plaintiff was entitled to recover all damages sustained through the wrongful refusal of the defendants to redeliver the property. There was a total breach of a single and entire obligation, and the plaintiff could not split his demand for relief on account of such breach, so as to entitle him to recover a part of such relief in one action, and the remainder in another. The rule thus stated is applicable, even if we assume, contrary to what we consider the fair construction of the pleading, that the complaint shows that the elements of damage now sought to be recovered were not known or ascertainable at the date of the former judgment. The principle involved has been fully considered and discussed in the recent case of *Abbott v. The 76 Land & Water Co.*, 161 Cal. 42, [118 Pac. 425], and it is unnecessary to repeat the arguments there elaborated. It will suffice to quote from

the opinion a single sentence, applying directly to the precise case before us. "In accord with the views we have stated," says Angellotti, J., "it has been held that the continued withholding of stocks or bonds after the bringing of action to enforce their delivery, pending the litigation and up to the time of the enforcement of the decree, is not a new wrong redressible by a new action, but is simply a continuation of the original wrong for which the only redress given by the law must be had in the original action, and that, consequently, a second action would not lie for the damage due to depreciation in the value of the stocks or bonds occurring between the time of the commencement of the first action and the determination of such action on appeal. (See *Bracken v. Atlantic Trust Co.*, 167 N. Y. 510, [82 Am. St. Rep. 731, 60 N. E. 772]; *Commerce Exchange Natl. Bank v. Blye*, 123 N. Y. 132, [25 N. E. 208].)

The demand for repayment of attorney's fees in the former action stands upon no different ground. If this was a proper element of damage at all, it was a damage which flowed from the single wrongful act of withholding redelivery of the stock. Plaintiff's right to reimbursement was therefore adjudicated against him by the judgment in the action to enforce such redelivery.

The judgment is affirmed.

Shaw, J., and Angellotti, J., concurred.

[L. A. No. 2929. Department One.—January 29, 1913.]

NATHANIEL C. FOSTER, Respondent, v. PHOEBE M. BUTLER, et al., Appellants.

MORTGAGE—FORECLOSURE—STATUTE OF LIMITATIONS—MORTGAGE EXECUTED OUT OF STATE—ABSENCE OF MORTGAGOR FROM STATE.—Under subdivision 1 of section 339 of the Code of Civil Procedure, the time within which an action can be brought to foreclose a mortgage securing a note, each of which were executed out of the state, is two years from the maturity of the indebtedness. So far as concerns the original mortgagor, under section 351 of that code, the time

during which he was absent from the state is not a part of the time limited for the commencement of the action.

ID.—WAIVER OF STATUTE BY MORTGAGOR—SUBSEQUENT PURCHASERS OR ENCUMBRANCERS NOT AFFECTED.—A mortgagor cannot, by waiving the bar of the statute of limitations, affect the right of a subsequent purchaser or encumbrancer of the mortgaged premises to insist, as to himself, that the action to foreclose the mortgage was not brought in time. This rule applies not only to cases where the waiver has been by express agreement, but also to cases where the original mortgagor has lost his right to plead the statute by absenting himself from the state.

ID.—PURCHASER AT EXECUTION SALE AGAINST MORTGAGOR—COMMENCEMENT OF RUNNING OF STATUTE.—Where the mortgaged premises were purchased at an execution sale, after the maturity of the mortgage indebtedness, the statute of limitations commenced to run in favor of the execution purchaser, who was present in the state, and against the right of the mortgagee to foreclose the mortgage as to him, at least as early as the date on which the sheriff's deed to such purchaser was recorded.

ID.—QUIETING TITLE BY EXECUTION PURCHASER—PLAINTIFF NOT A "RESIDENT" OF STATE—STIPULATION.—In an action by such subsequent purchaser to quiet his title to the mortgaged premises as against the successors in interest of the mortgagee, a stipulation that the plaintiff had never been a "resident" of the state of California, is in no wise inconsistent with the fact of his physical presence there, and does not preclude him from setting up the bar of the statute against the mortgage.

ID.—NONRESIDENTS ENTITLED TO BENEFITS OF STATUTE.—Section 351 of the Code of Civil Procedure does not deprive nonresidents of the benefits of the statute of limitations. It merely excludes from computation the time during which any defendant, resident or nonresident, may have been out of the state.

ID.—JUDGMENT QUIETING TITLE—PAYMENT OF MORTGAGE INDEBTEDNESS—APPEAL FROM ORDER DENYING NEW TRIAL.—In such action, the contention that the plaintiff should not have had a judgment quieting his title without paying or offering to pay the mortgage debt, even though an action to foreclose the mortgage be barred, involves a consideration of the claim that the findings do not support the judgment. Such claim might properly be made on an appeal from the judgment, but is not involved and cannot be considered on an appeal from an order denying a new trial.

APPEAL from an order of the Superior Court of San Diego County refusing a new trial. W. R. Guy, Judge.

The facts are stated in the opinion of the court.

A. H. Sweet, and Sam Ferry Smith, for Appellants.

W. J. Mossholder, and Marks P. Mossholder, for Respondent.

SLOSS, J.—This action was brought by Nathaniel C. Foster against the personal representative and the heirs at law of Andrew O. Butler, deceased, to quiet plaintiff's title to a tract of land in San Diego County. The heirs answered, asserting an interest under a mortgage executed by Charles G. Wheeler, Foster's predecessor in interest, to Andrew O. Butler. The administrator with the will annexed of Butler's estate answered, denying plaintiff's title.

The court gave judgment in favor of plaintiff. The defendant heirs moved for a new trial, which was denied, and they now appeal from the order denying their said motion.

The cause was presented upon an agreed statement of facts. Upon this statement the court below found that the mortgage from Wheeler to Butler did not constitute a lien upon the premises, for the reason that the mortgage and the note secured by it were barred by limitation. The principal question raised by this appeal is whether this finding properly resulted from the stipulated facts which are as follows:

On July 3, 1899, Charles G. Wheeler, who was then the owner of the land in question, executed to Andrew O. Butler his promissory note for three thousand dollars, with interest, payable six months after date, together with a mortgage of the land to secure said note. Both Wheeler and Butler were residents of Chicago, and the note and mortgage were executed and delivered in that city. Neither of them, as we construe the statement, has since been in the state of California, "except that Wheeler was temporarily in the county of San Diego for about three weeks in March and April, 1902."

No part of the principal or interest on said note has been paid.

On March 2, 1901, Foster, the plaintiff herein, commenced an action in the superior court of San Diego County against Wheeler and, on the same day, a writ of attachment was duly issued in said action and levied upon the land in controversy as Wheeler's property. Wheeler appeared and answered. On March 21, 1902, a personal judgment was entered in said

action in favor of Foster and against Wheeler for some fourteen thousand dollars. On March 22, 1902, a writ of execution was issued and levied upon said land, and on April 24, 1902, the interest of Wheeler therein was sold by the sheriff, at execution sale, to the plaintiff Foster. A certificate of sale was duly issued to the purchaser, and a duplicate filed in the office of the county recorder on the same day. No redemption was made, and on June 18, 1903, the sheriff executed and delivered to Foster a deed of said property. The sheriff's deed was recorded on June 19, 1903. Foster has never parted with his title, and has, ever since, been in constructive possession of the premises.

Andrew O. Butler died at Chicago on the fifteenth day of January, 1902, leaving a will, which was admitted to probate by the superior court of San Diego County on July 1, 1904. Butler's only heirs were his widow and three sons, all of whom are defendants herein. The widow is sole legatee and devisee under the will. The plaintiff has never been a resident of the state of California.

The complaint in this action was filed on the eighteenth day of June, 1908. The answer of appellants, asserting the mortgage lien, was filed November 25, 1908. The mortgage debt was payable on February 3, 1900, and, since the note and mortgage were executed out of the state, the time within which an action of foreclosure could have been brought was that declared by subdivision 1 of section 339 of the Code of Civil Procedure, i. e., two years. Under section 351 of the same code, the time during which a person sued is absent from the state is not "part of the time limited for the commencement of the action." So far, then, as Wheeler, the original mortgagor, is concerned, his absence from the state would have debarred him of the right to set up the statute of limitations in defense to an action brought against him on the note and mortgage. But the plaintiff, as successor to the interest of the mortgagor, stands in a different position. It is settled by a series of decisions, extending over many years, that the mortgagor cannot, by waiving the bar of the statute, affect the right of a subsequent purchaser or encumbrancer of the mortgaged premises to insist, as to himself, that the action was not brought in time. The rule was applied at an early date to cases where the waiver had been by express

agreement. (*Lord v. Morris*, 18 Cal. 482; *McCarty v. White*, 21 Cal. 495, [82 Am. Dec. 754].) And no different question arises where the original mortgagor has lost his right to plead the statute by absenting himself from the state. (*Wood v. Goodfellow*, 43 Cal. 185; *Watt v. Wright*, 66 Cal. 202, [5 Pac. 91]; *Filipini v. Trobock*, 134 Cal. 441, [62 Pac. 1066, 66 Pac. 587]; *Brandenstein v. Johnson*, 140 Cal. 29, [73 Pac. 744]; *California Title Ins. & T. Co. v. Miller*, 3 Cal. App. 55, [84 Pac. 453].) "When third persons have subsequently acquired interests in the mortgaged property they may invoke the aid of the statute as against the mortgage, even though the mortgagor, as between himself and the mortgagee, may have waived its protection; and we see no difference in principle between a suspension of the running of the statute resulting from an express waiver, and one caused by his voluntary act in absenting himself from the state." (*Wood v. Goodfellow*, 43 Cal. 185.) "The law as to this point," said McFarland, J., in *Brandenstein v. Johnson*, 140 Cal. 29, [73 Pac. 744], "has been settled by former decisions of this court . . . , and there seems to be no necessity for discussing it as if the question were still an open one."

If the statutory period of limitation did not commence to run in favor of Foster, the respondent, as early as March 2, 1901, when, by virtue of the levy of his writ of attachment, he became the owner of a lien appearing of record (Code Civ. Proc., sec. 542), the statute was certainly set in operation, at the latest, on June 19, 1903, when the sheriff's deed to him was recorded. In either view the time for enforcing any rights under the mortgage against Foster's interest in the property had long expired when this action was brought. It is argued that the agreed statement shows that not only the original mortgagor, but the plaintiff himself, was, by reason of absence from the state, precluded from setting up the bar of the statute. (See *Commercial Sav. Bank v. Hornberger*, 140 Cal. 16, [73 Pac. 625].) But the facts do not support this contention. There is no stipulation that Foster was out of the state for a period sufficient to save the mortgagee's right to sue him, or, in fact, that he was absent at all. It is declared in the agreed statement that plaintiff has never been a resident of California, but, of course, the fact that one is not a resident of a place is in no wise inconsistent with his

physical presence there. (Pol. Code, sec. 52.) To bring the plaintiff within the exception of section 351, it would have been necessary to show that he was not in fact within the state for periods aggregating two years between the accrual of a cause of action against him and the commencement of the action. The section does not assume to deprive nonresidents of the benefits of the statute of limitations. What it does is to exclude from computation the time during which any defendant, resident or nonresident, may have been out of the state. The force of this distinction was evidently recognized by the defendants themselves, for in their answer they do not content themselves with alleging that Foster was a nonresident, but aver, in addition, that he had been absent from the state since the twenty-eighth day of March, 1901. The latter averment, however, did not find its way into the agreed statement of facts.

For these reasons the finding that the note and mortgage were barred by the statute of limitations cannot be held to be unsupported.

The appellants make the further contention that the plaintiff should not be permitted to quiet his title against the appellants without paying or offering to pay the mortgage debt, even though an action to foreclose the mortgage be barred. On the record before us, this point cannot be presented otherwise than by a claim that the findings do not support the judgment. Such claim might properly be made on an appeal from the judgment, but is not involved and cannot be considered on an appeal from an order denying a new trial (*Great Western etc. Co. v. Chambers*, 153 Cal. 307, 310, [95 Pac. 151], and cases cited), which is all that we have before us here.

The order is affirmed.

Shaw, J., and Angellotti, J., concurred.

Hearing in Bank denied.

[S. F. No. 6029. Department One.—February 6, 1913.]

RUDOLPH C. HORNUNG, as Administrator of the Estate of **Laura Hornung, Deceased**, Appellant, v. **CATHERINE LESTER SEDGWICK et al.**, Respondents.

TRUST IN LAND—APPLICATION OF RENTS AND PROFITS FOR USE OF MINOR DURING MINORITY—DIRECTION FOR ACCUMULATION OF SURPLUS—TERMINATION OF TRUST—DEVOLUTION OF PROPERTY UPON DEATH OF MINOR.—A deed conveying land in trust, to hold, manage, and control the same, to collect the rents, issues, and profits thereof, to make all necessary repairs, improvements, etc., and “to pay out of the balance of the proceeds of said premises, all sums necessary for the proper education, maintenance, and support of” the minor son of the grantor, “until he shall have arrived at the age of twenty-one years,” and giving to the trustee “full power and discretion as to what may be necessary for the proper education, maintenance, and support of the said minor, in so far as the same relates to the trust fund hereby created,” with the power to sell the property, reinvest the proceeds, and to do all things necessary or proper in the management of the trust fund, and further providing, that in the event and upon the condition that the said minor should arrive at the age of twenty-one, the trust should terminate and the property conveyed, or the trust fund then in the hands of the trustee should be and become the absolute property of said minor, but in the event he should die before reaching that age, such property, or the trust fund which might exist at the date of his death, should be and become the property of other persons specified, who were not minors, creates a trust solely for the benefit of such minor, terminable upon his arriving at the age of majority or upon his death prior to such time, which is valid under subdivisions 3 and 4 of section 857 and section 724 of the Civil Code.

ID.—IMPERATIVE DIRECTION TO APPLY RENTS FOR USE OF MINOR—DISCRETION OF TRUSTEE.—The requirement of such deed that the trustee shall apply to the use of said minor so much of the net profits of the property as is necessary for his proper education, maintenance, and support during his minority, is absolute and imperative, leaving no discretion whatever in the trustee other than one to determine what things are necessary or proper to accomplish the education, maintenance, and support commanded. It will be assumed that the trustee will exercise that discretion fairly and honestly, with a view to provide so far as the net profits will warrant, for such education, maintenance, and support as are reasonable and proper.

ID.—IMPLIED DIRECTION FOR ACCUMULATION OF SURPLUS.—Fairly construed, such deed requires any possible surplus of the net profits to

accumulate for the benefit of the minor during his minority, as authorized by subdivision 4 of section 857 of the Civil Code, although no specific direction is given the trustee "to accumulate" them.

ID.—DEVOLUTION OF ACCUMULATIONS UPON DEATH OF MINOR DURING MINORITY.—It is immaterial to the validity of the trust for such minor, that under other provisions of the deed as to the devolution of the property upon the termination of the trust by his death before his majority, such accumulations, if any, will become the property of others who are not minors and who are persons in whose favor a direction to accumulate would not be valid. That result is a mere incident to the exercise by the trustor of the right given by the law to transfer the property subject to the execution of the trust.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. P. Mogan, Judge.

The facts are stated in the opinion of the court.

Edward C. Harrison, and Maurice E. Harrison, for Appellant.

Tobin & Tobin, and George A. Clough, for Respondents.

ANGELLOTTI, J.—This is an appeal by plaintiff from a judgment that he take nothing and that he has no interest in the real property described in his complaint, given in an action brought by him as administrator to recover possession of said property and to obtain a decree quieting the title of his intestate and her estate to said property as against defendants.

The appeal is on the judgment-roll alone. The findings of the trial court fully present the facts upon which the respective claims of the parties are based.

On May 13, 1909, plaintiff's intestate, Mrs. Laura Hornung, who it appears in the complaint was the wife of said Rudolph C. Hornung, was the owner of the real property involved, the same being a lot of land 25x105 feet on Willard Street in the city and county of San Francisco. On that day she signed, acknowledged, and delivered to defendants her deed of conveyance thereof. The sole question on this appeal is whether this instrument was effective to convey all the interest of Mrs. Hornung in said land. If it was so effective, the findings of the lower court fully sustain the judgment given.

The deed named Mrs. Hornung as the party of the first part, defendant Catherine Lester Sedgwick (then Catherine Lester) as party of the second part, and defendants Harold Joseph Hornung, a minor (her only child), said Catherine Lester, Lillie Mengel, Emma Matthesen, and Lewis Borle, parties of the third part. It purported first to convey the property to the parties of the second and third parts "in trust for the purposes and subject to the conditions" thereafter set forth. It then purported to grant such property to the party of the second part, now Mrs. Sedgwick, in trust, to hold, manage, and control the same, to collect the rents, issues, and profits thereof, to make all necessary repairs, improvements, etc., and "to pay out of the balance of the proceeds of said premises, all sums necessary for the proper education, maintenance and support of the above-named Harold Joseph Hornung, until he shall have arrived at the age of twenty-one years, and the said party of the first part, does hereby give and grant unto the said party of the second part, full power and discretion as to what may be necessary for the proper education, maintenance, and support of the said minor, in so far as the same relates to the trust fund hereby created." A provision follows conferring upon the trustee power to sell the property and reinvest the proceeds, to mortgage the same or any property which she may purchase with the said trust fund, and to do all things necessary or proper in the full and complete management, etc., of the said trust fund. It is then provided as follows:

"In the event and upon the condition that the said Harold Joseph Hornung, son of the party of the first part, should arrive at the age of twenty-one years, then and in that event the said trust shall terminate and the said real property hereinabove described, or the trust fund hereby created, then in the hands of the trustee, shall be and become the absolute property of the said Harold Joseph Hornung, and subject to the said condition and trust, the said party of the first part does hereby grant, transfer and convey to the said Harold Joseph Hornung, the real property hereinabove described.

"In the event and upon the condition that the said Harold Joseph Hornung shall die prior to reaching the age of twenty-one years, then and in that event the said real property, hereinabove described, or the trust fund, which may at the date

of the death of the said Harold Joseph Hornung, in case of his death prior to reaching the age of twenty-one years, be in existence, shall be and become the property of the above named Catherine Lester (widow), Lillie Mengel, wife of John Mengel, Emma Matthesen, wife of Joseph Matthesen, and Lewis Borle, and the party of the first part does hereby grant, transfer, and convey to the said last named parties, share and share alike, that is to say, an undivided one-fourth to each thereof, the said real property, hereinabove described, or in the event that the said real property had been sold, then the property constituting the trust fund, subject to the said condition hereinabove expressed."

This is followed by a provision as to the duties of the trustee in the event of a sale of the property.

A consideration of this instrument leaves no doubt as to the intention of Mrs. Hornung in executing it. She desired, first of all, to provide from the property, or its proceeds in the event of a sale thereof, for the proper education, maintenance, and support of her son during his minority, and secondly, she desired such property or proceeds, or what was then left of the same, to go absolutely to such son upon his arriving at the age of majority, if he should live so long; thirdly, in the event that he died before arriving at such age, she desired such property or proceeds, or what was left of the same at the time of his death to go in equal shares to the four other persons named as parties of the third part.

The contention of learned counsel for appellant is that the trust attempted to be created by the deed to carry into effect her intention relative to her son during the period of his minority is invalid under our statutory provisions regarding express trusts, and that the attempted grants in remainder are so dependent upon the execution of the trust that they also must fall with the attempted trust.

The attempted trust was solely for the benefit of the minor son of the grantor, and was to terminate upon his arriving at the age of majority or upon his death prior to such time. The other provisions were solely in the way of prescribing to whom the property to which such trusts related should belong "in the event of the failure or termination of the trust," and of a transfer of such property subject to the execution of the trust. (Civ. Code, sec. 864.) They may, however,

be looked to and considered in determining the proper construction of the provisions relating to the trust.

Subdivision 3 of section 857 of the Civil Code, provides that an express trust may be created to receive the rents and profits of real property, and pay them to or apply them to the use of any person during the life of such person, or for any shorter term, and subdivision 4 of the same section provides that such a trust may be created to receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by title two of part two, division two, of the Civil Code. Section 724 of the Civil Code, contained in said title two, permits provision for such an accumulation for the benefit of one or more minors then in being, terminating at the expiration of their minority.

We are of the opinion that these provisions fully authorize the trust attempted to be declared by the deed before us. The question in this connection is simply one of construction of such provisions, for of course learned counsel for appellant are correct in their statement that no trust in relation to real property is valid unless created or declared in writing. (Civ. Code, sec. 852.) But we think that fairly construed, the deed does declare these purposes. The requirement that the trustee shall pay out of the net profits of said property or its proceeds in the event of sale, all sums necessary for the proper education, maintenance, and support of the minor son during the period of his minority, in other words, shall apply to the use of said minor so much of said net profits as is necessary for such purposes during his minority, is absolute and imperative, leaving no discretion whatever in the trustee other than one to determine what things are necessary or proper to accomplish the education, maintenance, and support commanded. This matter of discretion we will discuss later. It is sufficient for the moment to point out that as to such things as are determined by the trustee to be necessary for the proper education, maintenance, and support of the minor, the duty of the trustee to apply the net profits, is absolute and imperative. As to any possible surplus of net profits remaining in the hands of the trustee after the application of such amounts as may be necessary for the purposes enumerated it is true that she is not in terms directed "to accumulate" the same for the benefit of the minor. But such

we think is fairly the effect of the provisions of the deed as to all amounts not so needed at any time during the minority of the beneficiary, for of course it was neither contemplated nor necessary to the validity of the trust to apply that it should be required that net profits to be devoted to that purpose must be so applied immediately on coming into the hands of the trustee. They were to be so applied as needed for the designated purposes, and in the mean time were to be retained by the trustee. But there might be net profits in excess of the amount so needed during the continuance of the trust. All of the net profits received by the trustee, whether so needed or not, while remaining in her custody, constituted a part of the *trust fund*, both under well settled principles of law and within the contemplation of the grantor, as is shown by her use of the words "trust fund hereby created" in the first provision as to the discretion to be exercised by the trustee. It was thereafter substantially provided that upon the completion of the minority of the son, all of the trust property or trust fund "then in the hands of the trustee" shall be and become the property of such son. These provisions, to our minds, necessarily imply a direction to the trustee to hold for the minor all portions of the rents and profits not necessary to be applied to the designated purposes, in other words, to accumulate the same for his benefit until he arrives at the age of majority. We thus have as to any surplus of rents and profits over the amounts to be applied to the use of the minor for education, etc., a sufficient declaration of a trust for accumulation authorized by subdivision 4 of section 857 of the Civil Code.

The fact that the right of the minor to receive the real property and the accumulated income is dependent upon the contingency of his attaining the age of majority, and that under the other provisions of the deed as to the devolution of the property upon the termination of the trust by his death before his majority, such accumulations, if any, will become the property of others who are not minors and who are persons in whose favor a direction to accumulate would not be valid, we regard as immaterial. As we have said, the attempted trust was one solely for the benefit of the minor. The whole object thereof was to make proper provision for the support, maintenance, and education of the minor and

to insure the keeping together for him during his minority of such of the property as was not required to be used for these purposes, so that it might go to him upon attaining the age of majority. The accumulation was directed solely for his benefit, and the same was to terminate immediately upon his death, if he died prior to attaining his majority. The fact that the amounts accumulated would go to others in the event of his death before majority was a thing entirely apart from and independent of any provision of the trust, and was a mere incident to the exercise by the trustor of the right given her by the law to transfer the property subject to the execution of the trust.

It is earnestly urged that the attempted trust to apply rents and profits to the use of the minor for his education, support, and maintenance is void for the reason that it is not imperative, but merely discretionary—in other words, that the trustee is left with full discretion to determine whether any of the rents and profits shall be applied to any of such purposes, and if any, how much. We have already referred to this point, and have shown, we think, that such is not a fair construction of the provisions of the deed. As we have said, the only discretion confided to the trustee is to determine what things are necessary or proper to accomplish the education, maintenance, and support of the minor, and, of course, it is to be assumed that the trustee will exercise that discretion fairly and honestly, with a view to provide, so far as the net profits will allow and warrant, for such education, maintenance, and support as are reasonable and proper. The duty of the trustee to apply such rents and profits for such education, maintenance, and support as may be found to be necessary is, as we have said, absolute and imperative. The language involved in *Estate of Sanford*, 136 Cal. 97, [68 Pac. 494], the case very strongly relied on by appellant, differed from that in the case at bar, and, as was pointed out in *Estate of Reith*, 144 Cal. 314, [77 Pac. 942], the trustees there were to receive the rents and profits and apply the same “to such extent . . . as in their judgment may be proper to and for the use and benefit” of certain children. This language was construed as leaving to the discretion of the trustees “what amount of the income shall be applied” to the purposes designated, entirely regardless of the needs of the beneficiaries,

or, as said by this court in *Estate of Dunphy*, 147 Cal. 95, [81 Pac. 315], through Mr. Justice McFarland, who wrote the opinion in the Sanford case, as leaving to the discretion of the trustees "what amount of the income, if any, should be applied." As we have shown, no such construction can fairly be given to the language in the deed before us. The views expressed in *Estate of Reith*, 144 Cal. 319, 320, [77 Pac. 942], in response to the claim made that the trust there involved was void for the reason that it left to the discretion of the trustee how much income shall be used for the support and education of the children, which was concurred in by three of the four justices concurring in the majority opinion in *Estate of Sanford*, 136 Cal. 97, [68 Pac. 494], are applicable to the case at bar, and fully sustain the trust here involved in so far as this objection is concerned.

It follows from what we have said that the attempted trust is valid and that the deed of Mrs. Hornung was effective to convey all of her interest in the property in suit.

The judgment is affirmed.

Shaw, J., and Sloss, J., concurred.

Hearing in Bank denied.

[S. F. No. 5928. Department One.—February 7, 1913.]

In the Matter of the Estate of ERNEST V. COWELL,
Deceased.

ESTATES OF DECEASED PERSONS—FAMILY ALLOWANCE—AMOUNT OF TEMPORARY ALLOWANCE—DISCRETION—APPEAL—In determining the amount of the temporary family allowance required by section 1464 of the Code of Civil Procedure to be paid to a surviving wife from the estate of her husband until the return of the inventory, much is left to the discretion of the judge to whom the application is made, and his action will not be disturbed on appeal unless it clearly appears that the discretion has been improperly exercised. In the present case, where the estate was valued at about a million dollars, and was not indebted, it is held that a temporary allowance of one thousand five hundred dollars per month for the sole support of the decedent's widow was not an abuse of discretion.

ID.—WIDOW HAVING OTHER MEANS OF SUPPORT—BEQUESTS TO WIDOW BY HUSBAND—WIDOW NOT PUT TO ELECTION.—Under the statutes of this state, the fact that a widow has property of her own or other means of subsistence, or is given bequests or devises by the will of her husband, not putting her to an election, in no way affects her right to such a temporary allowance from his estate as is reasonably necessary for her support. And the same is true as to her right to an allowance, under section 1466 of the Code of Civil Procedure, after the return of the inventory.

ID.—HUSBAND CANNOT DEPRIVE WIDOW OF RIGHT TO FAMILY ALLOWANCE—WIDOW PUT TO ELECTION.—It is not within the power of the husband by any provision of his will to deprive the widow of her right to a family allowance from his estate under the statutes, or in any wise to limit the power of the court in the exercise of its proper discretion to fix the amount to be allowed. He may, however, so frame his will that she cannot have the benefits thereby given her and those of the statutes also, and she will then be put to her election which she will take.

ID.—LANGUAGE OF WILL NECESSITATING ELECTION.—To put the wife to such an election, it is not necessary that the husband's will should contain an express declaration to that effect. It is sufficient that it should clearly appear from the language of the will that such was his intention. In the absence of such an express declaration there is no presumption of an intention on the part of the testator to put the widow to her election. To accomplish this result it must clearly and unequivocally appear that the provision made by the will was intended to be in lieu of such rights as are given by the law.

ID.—CONSTRUCTION OF WILL IN QUESTION—ELECTION NOT NECESSARY.—The testator, whose estate was valued at about one million dollars, the greater part of which consisted of stock in various manufacturing corporations in which he and his brother and sisters owned all the stock, by his will directed that his interest in such corporations should be converted into cash within seven years, and that in the mean time "the properties" should pay his wife the sum of one thousand dollars a month, and at the end of that period she should receive the income from two hundred and fifty thousand dollars during her life. At her death said sum was to be paid to the regents of the University of California, to whom a legacy of five hundred thousand dollars was also given "as soon as the money became available." After certain minor bequests, to pay which he directed that so much of his interest in such corporations as was necessary should be sold within one year, he further provided, in order that the affairs of such corporations might not be interfered with, that if all the bequests were paid within the seven years, it would not be necessary to sell any more of his interests, and that whatever remained after

paying "these bequests and final settlement" should become the property of his brother and sisters. In the event that none of them survived, the residue was left to such regents for specified purposes. *Held*, that there was nothing in the will inconsistent with the right of the widow to receive a family allowance and that she was not put to an election.

ID.—ABSENCE OF WITNESS—REFUSAL OF CONTINUANCE.—It was not prejudicially erroneous to refuse to continue the hearing of the widow's application for a family allowance, on account of the absence of a witness for the estate, if the substance of the testimony expected to be elicited from him was given by another witness.

APPEAL from an order of the Superior Court of the City and County of San Francisco directing the payment of a family allowance from the estate of a deceased person until the return of the inventory of the estate. Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

Mastick & Partridge, for Appellants.

W. I. Brobeck, and P. F. Dunne, for Respondent.

ANGELLOTTI, J.—This is an appeal by a brother and two sisters of deceased, who are residuary legatees under his will, from an order directing the payment to Alice M. Cowell, his widow, for her support, of the sum of one thousand five hundred dollars per month, from the date of his death, March 18, 1911, until the return of the inventory of his estate.

The deceased left an estate valued at about one million dollars. The greater portion of this estate was his one-fourth interest in the property distributed in the estate of his father, Henry Cowell, his brother and two sisters owning the remaining three-fourths. The greater part of this again was held through three corporations, engaged generally in the manufacture of cement, of which he, his brother and sisters owned the stock, he holding one-fourth. These corporations were indebted to the extent of some six hundred thousand dollars, which indebtedness, on account of the very large earnings reasonably anticipated, would probably be wholly discharged in two or three years if no dividend was declared. It is not suggested that the estate of deceased was at all indebted,

except in so far as it might be liable on account of the indebtedness of these corporations. There was a parol understanding between the brothers and sisters that all earnings of the corporations shall be applied to the payment of the debt until the same is discharged. The property of the Henry Cowell estate outside of the corporations yielded an annual income of about twenty-five thousand dollars, of which deceased owned one-fourth. In addition to this deceased owned stock in the Bank of California valued at twenty thousand dollars and about twenty-three thousand dollars in cash in bank.

Deceased left no heir other than his wife and his brother and sisters.

By his will deceased provided as follows: All cash and bank stock were "to be at once delivered" to his wife, "whom I desire appointed executrix without bonds for all such property." He then declared:

"Second:

"I desire that all my one-fourth interests in the various Cowell properties be converted into cash within seven years, and that until such distribution, the properties are to pay my wife Alice M. Cowell the sum of one thousand dollars in gold coin on the first of every month. At the end of seven years she is to receive the income from two hundred and fifty thousand dollars as long as she may live. At her death the said two hundred and fifty thousand dollars is to be paid to the regents of the University of California for the purpose of building a hospital on the grounds at Berkeley."

He then gave, "as soon as the money becomes available," five hundred thousand dollars to the regents of the University of California for a students' gymnasium and a stadium on the grounds at Berkeley. He then gave legacies of one thousand dollars to certain employees and five hundred dollars to others, two thousand five hundred dollars each to Patrick Dorsey and Cornelius Coghlan and a legacy of ten thousand dollars to the Cowell Scholarship Committee of Santa Cruz. He then directed that as much of his one-fourth interest in the Cowell properties as was necessary to pay the "minor bequests" should be sold within one year. He then provided as follows:

“Tenth:

“That the affairs of the Cowell Co. may in no wise be interfered with, I hereby direct that if all these bequests are paid within seven years from the date of my death it will not be necessary that any more of my interests be sold than will carry out these bequests. Whatever remains after paying these bequests and final settlement is to become the property of my brother and sisters.”

He then provided: “if none survive” the residue shall go to the regents of the University of California for certain purposes, and appointed his wife and Alexander F. Morrison executors without bonds.

The allowance made was what was styled by Mr. Justice De Haven in *Estate of Lux*, 100 Cal. 593, [35 Pac. 341], the “preliminary or temporary allowance” required to be made by section 1464 of the Code of Civil Procedure, which provides that when a person dies leaving a widow or minor children, the widow or children, until the inventory is returned, are entitled to remain in the possession of the homestead, the wearing apparel of the family, and of all the household furniture, “and are also entitled to a reasonable provision for their support, to be allowed by the superior court or a judge thereof.” The allowance so made terminates upon the return of the inventory (*In re Lux*, 100 Cal. 593, [35 Pac. 341]; *Crew v. Pratt*, 119 Cal. 137, [51 Pac. 44]; *Estate of Bell*, 142 Cal. 100, [75 Pac. 679]), when the court may make an order for such allowance as may be necessary during the further progress of the settlement of the estate. (Code Civ. Proc., sec. 1466.)

It is urged that the amount allowed was much greater than any sum reasonably necessary for the support of the widow. In the determination of a question of this character much is necessarily left to the discretion of the judge to whom the application is made. His action will not be disturbed on appeal unless it clearly appears that the discretion has been improperly exercised. (*In re Lux*, 100 Cal. 605, [35 Pac. 341]; *Estate of Bump*, 152 Cal. 279, [92 Pac. 643].) “The court is not restricted, in making this allowance, to a bare support for the widow. Regard should be had . . . to the mode in which she lived during the lifetime of her husband. The allowance is to be sufficient to provide all the necessities

of life, and this will include all those things which are reasonable and proper for one in the home and in social intercourse, in view of the condition and value of the estate and the station and surroundings of the family." (*In re Lux*, 100 Cal. 593, [35 Pac. 341].) In view of the condition and value of this estate the widow was entitled to continue to live, if she so desired, at the hotel where she and her husband had lived for several years immediately preceding his death, and to be maintained in such a way, as regards board, lodging, attendance, clothing, and the comforts of life generally, as would be considered reasonable and proper for the widow of one leaving an estate valued at a million dollars, for it seems clear that the estate of deceased, after payment of debts, will easily reach that amount. This leaves a wide range for the discretion of the judge in probate, and even if we were inclined in view of the record on this appeal, to consider that the amount allowed is more than we would have given had we been in his place, invested with the discretion committed by the law to him, we are of the opinion that it is not so high, in view of the circumstances and condition of the estate, that we can say that there has been any abuse of discretion on his part.

It seems to be well settled under such statutes as ours that the fact that a widow has property of her own or other means of subsistence, in no way affects her right to such an allowance from the estate of her deceased husband as is reasonably necessary for her support. The statute gives her this right to be so supported by the estate, regardless of her own means. (See *Estate of Lux*, 100 Cal. 604-5, [35 Pac. 341]; *Estate of Bump*, 152 Cal. 276, [92 Pac. 643].) And it also appears to be settled in this state, even as to an allowance made under section 1466 of the Code of Civil Procedure after the return of the inventory, that the fact that the widow is given property by the will of her husband in no way affects her right to be given by way of allowance for support such sum as is reasonably necessary therefor, leaving the property given her by the will, in the words of the chief justice in his concurring opinion in *Estate of Lux*, 114 Cal. 83, [45 Pac. 1026], "whether distributed pending the administration, or at the close of it, . . . to go to the widow intact, and undiminished by any charge for expense of administration or support of

family.” (See *Estate of Lux*, 100 Cal. 593, [35 Pac. 341]; *Id.* 114 Cal. 73, [45 Pac. 1023].) Especially does it appear to us that bequests and devises to the wife are altogether immaterial in connection with the question of the preliminary or temporary allowance to be made at the outset for the period prior to the return of the inventory. We can see no good reason for concluding that it affects the question that a bequest or devise is by the terms of the will made available to the widow, in whole or in part, at once. This appears to have been the view of at least four of the justices in *Estate of Lux*, 114 Cal. 73, [45 Pac. 1023]. Of course, we are not now speaking of such a provision in a will as puts the widow to her election.

It is not within the power of the husband by any provision of his will to deprive the widow of her right to a family allowance from the estate under the statutes, or to in any wise limit the power of the court in the exercise of its proper discretion to fix the amount to be allowed. (See *Estate of Bump*, 152 Cal. 278, [92 Pac. 643], and cases there cited.) But, of course, he may so frame his will that she cannot have the benefits thereby given her and those of the statutes also, and she will then be put to her election which she will take. (*Id.*) It is claimed that deceased so did. His will nowhere declares in express words that the provision made for his wife is in lieu of such provision for her support during the administration of the estate as she would be entitled to under the statutes of this state, as was the case in *Estate of Bump*, 152 Cal. 278, [92 Pac. 643], and *Estate of Lufkin*, 131 Cal. 291, [63 Pac. 469]. In the will before us such provision as is made for the wife is in terms absolute and unconditional. But it is not essential to the imposition of the duty of election that a declaration to the effect above stated should be expressly made. It is sufficient that it should clearly appear from the language of the will that such was the intention of the testator. We do not understand, however, that in the absence of such an express declaration there is any presumption of an intention on the part of the testator to put the widow to her election. To accomplish this result it must clearly and unequivocally appear that the provision made by the will was intended to be in lieu of such rights as are given by the law.

We do not think that such is the situation here. The provision that "the properties are to pay" the widow one thousand dollars on the first day of every month "until such distribution" does not so show such an intention. While the language of the provision of the will numbered "second," which is the only provision in the will in her favor with the possible exception of the preceding provision as to cash and bank stock, is not as well chosen as it might have been, we think it clear enough that the design thereof was practically to give to the wife as a bequest the income for her life from two hundred and fifty thousand dollars of his estate, from the time of his death. As he desired that there should be no immediate segregation of his interest from the other "Cowell properties," he definitely fixed one thousand dollars as the amount that she should receive monthly from his death until his interest should be so segregated, fixing the end of seven years as the time by which the division must be made. The amount so fixed was what might reasonably be considered a fair return on two hundred and fifty thousand dollars safely invested, being just a trifle less than five per cent per annum on such amount. When the segregation or "distribution" as he puts it is had, she is thenceforth to receive the income of two hundred and fifty thousand dollars thereof. The gift thus made is absolute and unconditional, with absolutely nothing being said to indicate that it is anything else than a legacy. Whether we call it an annuity or a demonstrative legacy is unimportant here. We see nothing in the fact that it was contemplated that the amount fixed was to be paid monthly from the time of the death of the deceased, to require a different conclusion.

We are of the opinion that there is nothing in the will inconsistent with the right of the widow to receive a family allowance. The deceased has not thereby disposed of all property other than that given to the widow "in such a way as to make it apparent that the assertion by the widow of the right to take, both under the law and under the will would defeat the manifest purpose of the testator." (See *Shipman v. Keys*, 127 Ind. 353, [26 N. E. 896].) It is not pretended that all the bequests made thereby cannot be fully paid in such event. The only persons who will suffer thereby are those who are given "whatever remains after paying these

bequests and final settlement." These are the brother and sisters of deceased (appellants here) if they or any of them are then alive, and if none survive, then the regents of the University of California, who have already been given five hundred thousand dollars outright, and, upon the death of the wife, the two hundred and fifty thousand dollars set apart for her use during her life. We thus have as to these parties merely a general disposition of what may be left after all bequests and charges are paid. Such a disposition is not at all inconsistent with the assertion by the widow of her statutory right to a family allowance notwithstanding the provision made for her by the will. (See *Shipman v. Keys*, 127 Ind. 353, [26 N. E. 896].) It is to be noted that the language is "whatever remains after paying these bequests *and final settlement*," clearly referring only to such property as may remain at final settlement after not only the bequests have been paid, but also all such other amounts as may lawfully be required to be paid in the course of the administration and settlement of the estate. This would of course include such amounts as the widow was entitled to as family allowance under the statutes of the state. As said in the case last cited, such a disposition will be construed as made in view of the absolute statutory rights of the wife and subject thereto.

We see nothing in the expressed desires of the testator with regard to sales and refraining from interference with the affairs of the "Cowell Co." to any greater extent than is necessary, that materially assists in the determination of the question before us. The same is true as to the evidence that there was an understanding between deceased and his brother and sisters, the stockholders in the Cowell corporations, that all the earnings thereof shall be applied to the discharge of the indebtedness thereof until the same is fully paid, even if we assume that this evidence may properly be taken into consideration in determining the proper construction of the will in the matter under consideration.

Taking the will as a whole, we are unable to find therein any sufficient warrant for a conclusion that the widow was thereby put to her election in the matter of family allowance.

There was certainly no prejudicial error in refusing to continue the hearing of the application for family allowance until the return of Mr. George, who was desired as a witness by

appellant, from Oregon. The testimony expected to be elicited from him, as stated by the attorney for appellants to the court below, was in no substantial respect different from that given by Mr. Morrison, one of the executors, the only witness who testified in detail as to the condition and circumstances of the estate. While the testimony given by him was in many respects hearsay, his information having been largely obtained from Mr. George, it was received without objection, and, as said before, was in substantial accord with what the learned attorney for appellants stated he expected to prove by Mr. George.

The order appealed from is affirmed.

Shaw, J., and Sloss, J., concurred.

Hearing in Bank denied.

[S. F. No. 6058. Department One.—February 7, 1913.]

ALICE L. MEYER, Respondent, v. CITY STREET IMPROVEMENT COMPANY (a Corporation), Appellant.

MECHANICS' LIENS—LIEN FOR STREET IMPROVEMENT.—Section 1191 of the Code of Civil Procedure gives a lien to any person who, at the request of the owner of a lot in any incorporated city or town, "grades, fills in, or otherwise improves the same," or the street or sidewalk in front of such lot, or who "makes any improvements in connection therewith."

ID.—NOTICE OF COMPLETION OF WORK NOT REQUIRED.—Section 1187 of the Code of Civil Procedure, as it existed prior to the revision of the Mechanics' Lien Law in 1911 (Stats. 1911, p. 1313), requires a notice of completion of work to be filed by the owner in every case in which a lien may be filed under section 1183, but is silent as to liens under section 1191; therefore in case of improvements under the latter section a notice of completion is not required.

ID.—TIME FOR FILING LIEN FOR STREET IMPROVEMENT—STATEMENT OF LIEN.—The proviso of section 1187 of that code, as then existing, "that in any event all claims of lien must be filed within ninety days after the completion of said . . . improvement," is applicable to any and every improvement for which a lien is given, including those under section 1191 as well as those under section 1183, and the pro-

visions of that section prescribing the form of the statement of liens and requiring that such statement be filed, apply to all such liens.

ID.—TIME FOR COMMENCEMENT OF ACTION TO ENFORCE LIEN.—Section 1190 of that code, as then existing, providing that “no lien provided for in this chapter binds any . . . improvement . . . for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same,” applies to actions for the enforcement of liens for work done under section 1191.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Bishop, Hoefler, Cook & Harwood, for Appellant.

Stafford & Stafford, for Respondent.

SHAW, J.—The action herein was in the ordinary form of a suit to quiet title. An answer and cross-complaint were filed by the appellant in which it set up that it had a lien on plaintiff's lot by virtue of a contract for the improvement of the street in front thereof, entered into with plaintiff's grantor who owned the lot at the time of the contract. The trial court held that the appellant had no lien and gave judgment quieting respondent's title, from which judgment, and from an order refusing a new trial, the present appeals are taken.

The improvement referred to consisted of paving and curbing the street in front of the lot. It was completed on August 13, 1909, under a contract with Frederick P. Zwicker, made on June 17, 1908. At that time the lot belonged in equal shares to Frederick P. Zwicker and his wife, Helene M. F. Zwicker. On September 8, 1909, Frederick conveyed his interest to his wife, and on December 22, 1909, she conveyed the entire lot to the plaintiff. On January 5, 1910, the defendant filed in the recorder's office a claim of lien on said lot for the contract price of said improvement, which claim was in the form prescribed for claims of liens by section 1187 of the Code of Civil Procedure. The cross-complaint to foreclose the alleged lien for this work was filed on July 27,

1910. The owners of the lot did not file any notice of the completion of the improvement as provided by section 1187, and no term of credit was given for payment of the amount due for said improvement.

It will be noted that, although the work was completed on August 13, 1909, the claim of lien was not filed until January 5, 1910, and the cross-complaint to foreclose said lien was not filed until July 27, 1910. The court below held that there was no lien for two reasons: 1. Because the defendant did not file the claim of lien within the time prescribed by section 1187 aforesaid: and 2. Because an action to foreclose was not begun within the time limited by section 1190 of the Code of Civil Procedure, as it read prior to the amendment of 1911 thereto. The defendant contends that under the provisions of the code prior to said amendment of 1911, it was not necessary to file a claim of lien for improvements of a street in front of a lot, made at the request of the owner; also that, if such lien must be filed, the owner who does not file notice of completion under section 1187 is forever estopped to show that the lien was not filed in time; also that section 1190 does not apply to liens for work done under the provisions of section 1191.

The decision of these questions depends on the meaning and effect of the Mechanics' Lien Law in force prior to the revision thereof by the legislature of 1911. (Stats. 1911, p. 1313.) The sections involved in this case are so amended by that revision that an interpretation of the former sections would not determine the effect of the revised act. The lien law has been amended so often and with apparently such slight consideration of the relation of one section to another and with such free use of the same or similar expressions to refer to distinct things, that a complete discussion of the various expressions involved and of the decisions construing similar expressions in other sections would extend this opinion to a length which we deem unnecessary, in view of the fact that, so far as the questions under consideration are concerned, the original act is practically superseded by the revision. We therefore give only a brief statement of our conclusions as to the meaning and effect of the different sections as applied to the present case.

1. Section 1191 gives a lien to any person who, at the request of the owner of a lot in any incorporated city or town, "grades, fills in, or otherwise improves the same," or the street or sidewalk in front of such lot, or who "makes any improvements in connection therewith." It was not amended in 1911.

As originally enacted, section 1187 provided only for the time of filing claims of lien and the form thereof. The provision requiring the filing of notices of completion was added by amendment in 1897. Instead of placing this provision at the end of the section, it was inserted as the opening paragraph, and the original provisions concerning claims of lien were made the second paragraph. The first paragraph requires a notice of completion to be filed by the owner in every case in which a lien may be filed under section 1183, but it is silent as to liens under section 1191 and, therefore, in the case of improvements under the latter section a notice of completion is not required.

The introductory part of the second paragraph of section 1187 allows to original contractors sixty days and to other persons thirty days, after the filing of notice of completion, as the utmost limit of the time for filing claims of lien upon any "building, improvement, or structure." This cannot apply to liens under section 1191, for, as we have seen, the owner need not file such notice of completion of work done under that section. The only provision of section 1187 that fixes the time for filing claims of lien under section 1191, is the *proviso* immediately succeeding the clause prescribing the form of the claim. It is as follows: "Provided, however, that in any event all claims of lien must be filed within ninety days after the completion of said building, improvement, or structure, or the alteration, addition to, or repair thereof."

We cannot believe that the legislature intended to create a lien for work upon a lot, or upon the street in front of it, which should continue without limit, or at least for the full time of the period of limitation of the cause of action against the owner, without any provision for making it a matter of record, or for giving notice to the owner, or his successor. Yet this would be the result if the provisions of section 1187, requiring the filing of claims of lien and fixing the time

therefor, do not apply to liens under section 1191. The act, as a whole, shows that its policy is to require a record notice of all liens. It would not be good public policy to allow secret liens of this character. It should not be so construed unless its language permits no other reasonable interpretation. The word "improvement," has a broad meaning. In its ordinary use it includes the work of grading an abutting street, as well as buildings, and the like, upon the lot itself. While the intent to require liens to be filed for work under section 1191 is not clearly stated, yet we think the section plainly implies that such claims must be filed for all work mentioned in the section or included in its terms. We therefore hold that the word "improvement" in the proviso was used in the broadest sense, to include any and every improvement for which a lien is given by the chapter, those under section 1191, as well as those under section 1183, and that the provisions prescribing the form of the statement and requiring that such statement be filed, apply to all such liens.

In *Warren v. Hopkins*, 110 Cal. 506, [42 Pac. 986], in construing section 1188, the court held that the word "improvements" as used in that section, refers only to the works and buildings mentioned in section 1183. But this narrow meaning of the word, as there used, is necessarily implied from the context, especially the last clause, which speaks of the liens therein referred to as liens for improvements "upon the land upon which the same are situated." This explains the case and shows that it does not fix the meaning of the word in other sections with a different context. The decisions in *Kreuzberger v. Wingfield*, 96 Cal. 257, [31 Pac. 109], and *Macomber v. Bigelow*, 126 Cal. 13, [58 Pac. 312], merely hold that the liens provided for by section 1191 are not governed by the provisions of section 1183 relating to the form of the contract and mode of contracting. They are not otherwise important here.

2. Section 1190 is as follows: "No lien provided for in this chapter binds any building, mining claim, improvement, or structure for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for a longer time than two

years from the time the work is completed, by any agreement to give credit.”

Here is an express declaration making the provision applicable to all liens provided for in the chapter. And at the close of the provision in regard to the effect of giving credit, there is a reference to the time when “the work is completed.” a phrase which refers as aptly to work under section 1191 as to that done under section 1183. The reasons already given as to the construction of section 1187 are pertinent here. The word “improvement” was here again evidently used to include any kind of improvement for which a lien is given by any section of the chapter, and it includes work done under section 1191.

For these reasons we hold that the claim of lien of the defendant should have been filed at least within ninety days after the completion of the work, and that the action should have been begun to enforce it (a cross-complaint in this instance), within ninety days after the filing of such lien. This conclusion makes it unnecessary to consider the other points presented. The court below correctly refused to allow the defendant any relief.

The judgment and order are affirmed.

Angellotti, J., and Sloss, J., concurred.

Hearing in Bank denied.

[L. A. No. 2997. Department One.—February 11, 1913.]

GEORGE W. BORGWARDT et al., Respondents, v. MCKITTRICK OIL COMPANY, Appellant.

MINERAL LOCATION—PLACER CLAIM—LOCATION PERFECTED BY DISCOVERY—ASSESSMENT WORK—ACTUAL POSSESSION.—An actual discovery of minerals in paying quantities on a placer mining location on the public domain of the United States subject to mineral location, perfects the location, obviates the necessity of any further work thereon except the assessment work required annually on a claim after discovery and before patent, and dispenses with the necessity of further actual possession.

Id.—DEVELOPMENT OF SEVERAL LOCATIONS THROUGH AGENCY OF CORPORATION.—No statute, rule, or policy relating to the disposition of mineral lands, and limiting the quantity of placer mineral land which may be located by one person, forbids a number of persons, who had made *bona fide* locations of placer mining claims in their individual names, the aggregate area of which was within the limit of the amount allowed them by law, from conveying their respective claims to a corporation, organized by them as an agency by means of which their joint interests might be regulated and handled, and in which they became stockholders in equal shares.

Id.—ACTUAL DISCOVERY—ASSESSMENT WORK—FORFEITURE.—Until a sufficient actual discovery of mineral is made on a placer mining claim, a location is not perfected, and no question of the doing of annual assessment work is involved. It is only after such discovery, when actual possession is no longer necessary to protect the location against subsequent locators, that annual assessment work is essential to prevent a forfeiture.

Id.—RIGHTS OF LOCATOR PRIOR TO DISCOVERY—OIL CLAIM—POSSESSION—PROSECUTION OF DISCOVERY WORK.—The locator of an oil claim, after the posting of notice of location, etc., acquires no vested right which Congress is obliged to recognize, until the inchoate location is perfected by discovery. But where his location is made in good faith, he has the right, as against third persons, which is transferable, to be protected against all forms of forceable, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession, so long as he remains in possession and with due diligence prosecutes his work toward a discovery. While such a condition continues, no one without his consent can make the actual entry of the land essential to legally initiate a new location.

Id.—NECESSITY OF ACTUAL POSSESSION—DILIGENT PROSECUTION OF DISCOVERY WORK.—Actual possession of the land by such locator, coupled with continued diligent prosecution of discovery work, with the expenditure of whatever money may be necessary to the end in view, are essential to his protection, and it is only one so actually possessed and so engaged in the diligent prosecution of the work of discovery, who is protected, by reason of his attempted location, against an entry by another.

Id.—INSUFFICIENT EVIDENCE OF DISCOVERY WORK—PLACING MEN IN CHARGE OF CLAIM—EFFORTS TO HIRE PERSONS TO DO WORK.—In an action to quiet title to oil lands claimed by the respective parties under different locations, a finding that the plaintiffs were engaged in the prosecution of discovery work at a time when the defendant entered the land and commenced its own discovery work, is not sustained by evidence merely to the effect that the plaintiffs had placed men in a cabin on an adjoining tract of land, with directions simply to watch their location and walk over it once or twice a day, and the mere fact that the plaintiffs, during the inter-

val between their location and the entry of the defendant, were engaged in negotiations with other persons as to what they would charge for doing the work of discovery, or were making an effort to find someone who would do such work at a satisfactory price, is insufficient to constitute a diligent prosecution of the work of discovery.

ID.—REASONABLE TIME TO COMMENCE DISCOVERY WORK NOT ALLOWED.

The attempting locator is protected in his possession only while he may fairly be held to be actually engaged in such work as may reasonably be held to be discovery work. He is not protected in his possession without commencing such work for a reasonable time after making his location.

ID.—LOCATOR PRIOR TO DISCOVERY MAY COMMENCE WORK AT ANY TIME BEFORE RIGHTS OF OTHERS HAVE ATTACHED.—

A prior locator of a placer mining claim, the location of which had never been perfected by discovery, and which he had not voluntarily abandoned, did not forfeit his location by the mere failure to prosecute development work, and had the right to subsequently enter into possession of the land and do discovery work thereon at any time he could do so without transgressing any right obtained by another.

ID.—SUBSEQUENT LOCATION—DISCOVERY WORK FIRST INITIATED BY

PRIOR LOCATOR.—Such a prior locator, by again going into possession and commencing discovery work, did not violate any right of a subsequent locator, who was not at the time in the actual possession of the land, engaged in the diligent prosecution of discovery work thereon.

ID.—EVIDENCE OF DISCOVERY OF OIL—PASSING THROUGH OIL SANDS TO

REACH LOWER DEPTHS—WELL RENDERED USELESS BY FLOW OF WATER.—The locator of an oil claim, immediately following his location, proceeded with the work of development, with the result that a well was drilled to the depth of about one thousand one hundred feet. At a depth of some seven hundred and seventy-five feet, twenty-five feet of rich oil sands were discovered, capable of producing forty barrels of oil per day. No oil was in fact produced, the locator endeavoring to pass through and reach a greater production at a lower depth. Finally an immense flow of artesian water was struck, which prevented further operations in that well. *Held*, that a sufficient discovery of oil was made to perfect the location.

APPEAL from a judgment of the Superior Court of Kern County. . J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

J. W. P. Laird, and F. E. Borton, for Appellant.

George E. Whitaker, Charles G. Lamberson, and Lamberson & Lamberson, for Respondents.

ANGELLOTTI, J.—This is an appeal from a judgment given in an action commenced June 1, 1908, to quiet plaintiffs' title to the northeast quarter of section 12, township 30 south, range 21 east, Mt. Diablo base and meridian, containing one hundred and sixty acres, which is valuable for petroleum oil. Plaintiffs claim under an attempted United States placer mining location, initiated by the posting by them of notice of location on the ground on May 26, 1908, while defendant claims under two locations initiated on September 19, 1899, one including the north one-half of said northeast quarter, with lots 1 and 2 in the northwest quarter of the same section, and the other including the south one-half of said northeast one-quarter, with lots 3, 4, 5, and 6 in the southeast quarter of the same section.

The findings of the trial court, which are in full accord with the allegations of the complaint of plaintiffs, are to the following effect: Plaintiffs, who were then citizens of the United States over the age of twenty-one years, on May 26, 1908, filed a mineral location covering said quarter section under and pursuant to the provisions of chapter VI, title 32, Revised Statutes of the United States, by posting a notice in due form thereon where it was easily discernible, and performing the other acts essential to the initiation of a location. All said land was at said time a part of the public domain of the United States, and was unappropriated, open, vacant, and unoccupied land, subject to location and entry by citizens of the United States. Immediately following the making of such location, they entered upon the occupancy and possession thereof, and continued in the exclusive possession thereof up to May 29, 1908, engaged in the development of the same for the oils, gypsum, and other minerals contained therein. During the night of May 29, 1908, while plaintiffs were in such possession, the defendant without their consent entered in and upon the surface lines of said claim, announcing its intention to drill for mineral oils contained therein, and have ever since proceeded and are now proceeding "to put into effect the said announcement and the preliminary work of drilling for said mineral oils." The court further found that

at the time of plaintiffs' location the land was not held by the defendant under or by virtue of any mineral location whatever, and the defendant was not the owner of or entitled to the possession of or in the occupancy or possession of said land or any part thereof, or actively or in good faith engaged in the work of prosecuting the development of said land or any part thereof for oil. It further found that any attempted location which defendant had made upon said land had, prior to May 26, 1908, become forfeited by reason of the failure of defendant or its predecessors in interest to do or perform the assessment work required by law to be performed upon said land during the year 1907, and that defendant was not thereafter, or on August 18, 1908, in the possession or occupancy of the land under any mineral location whatever. It further found that plaintiffs within a reasonable time after their location, commenced in good faith the work of developing the land for the mineral oil contained therein and prosecuted the same with reasonable diligence until the discovery of oil in a well drilled by the lessees of plaintiffs.

Judgment was given that subject only to the paramount title of the United States, the plaintiffs are the sole owners of said land, and enjoining defendant from asserting any claim thereto. As we have said, this is an appeal by defendant from such judgment.

It is claimed that the findings are in certain material respects without support from the evidence.

Except in regard to the matter of assessment work for the year 1907, there is practically no conflict in the evidence. Substantially, such evidence is as follows: As we have said, defendant claims under two locations initiated on September 19, 1899, one including the north half of said northeast quarter, with lots 1 and 2 in the northwest quarter of the same section, and the other including the south half of said northeast quarter, with lots 3, 4, 5, and 6 in the southeast quarter of the same section. Notices of location were posted on September 19, 1899, on these two claims on behalf of the requisite number of persons, who at such time intended to work through the agency of a corporation in which they were to hold the stock in equal shares, and who subsequently, on December 2, 1899, conveyed their respective interests to defendant corporation. The work of development was imme-

diately proceeded with on lot 5 in the southeast quarter of the section, with the result that a well was drilled to the depth of about one thousand one hundred feet. At a depth of some seven hundred and seventy-five feet, twenty-five feet of rich oil sands were discovered, capable of producing, it is claimed, forty barrels of oil per day. No oil was in fact produced, defendant endeavoring to pass through and reach a greater production at a lower depth. Finally an immense flow of artesian water was struck, which effectually prevented further operations in that well. This was in the latter part of 1899 or the early part of 1900. It may be conceded that from such time until May 28, 1908, there was no such continuous work as would warrant a conclusion that defendant was continuously and diligently prosecuting any discovery work on either location, and that it was not doing so on May 26, 1908. It claims that a sufficient discovery was shown on the southerly location by what we have already stated, which perfected that location, obviated the necessity of any further work except the one hundred dollars assessment work required annually on a claim after discovery and before patent, and dispensed with the necessity of further actual possession, all of which results do follow an actual discovery. Defendant owned other claims, adjoining or cornering on these locations, on some of which it was prosecuting work. In April, 1908, defendant's board of directors voted to order the timbers for a rig to drill a well on the northerly location. At this time, Mr. Davis, who located the alleged claim, as agent of plaintiffs, was the foreman of defendant, as well as a stockholder and director therein. Early in May he severed his relations with defendant. On May 23, 1908, defendant commenced the overhauling and repair of a water pipe-line to be used in drilling on said northerly location. On May 26, 1908, Davis went upon the northeast quarter of section 12 to locate the same for plaintiffs. At that time no one was in actual physical possession of any part thereof. There was an old cabin on the northerly one-half of said northeast quarter, and another old cabin on the southeast quarter of said section, some little distance outside of the lines of the land attempted to be located by him, but within the lines of defendant's southerly location. Both of these cabins had been erected by defendant. Davis posted his notice of location, and looked at the bound-

aries already marked on the ground. On May 27, 1908, he departed for Bakersfield, leaving a man named Garner in the cabin on the southeast quarter of the section, with directions to get two or three other men to watch the claim, and stay on the ground. During the evening of May 28, 1908, defendant brought to the north half of said northeast quarter in wagons certain timber for the construction of a rig to bore a well, and deposited the same thereon, following this with rig lumber on the next day. Davis returned to the land on May 29, with a surveyor to run the lines, and found the timber that had already been left there by defendant, and also found a man occupying the cabin thereon, who had been left in possession by defendant. On May 30th or 31st he returned again, staying overnight, and sleeping in the cabin on the north half of the northeast quarter with the man who occupied the same for defendant. He returned to Bakersfield the next day, and on June 1, 1908, this action was commenced. The only actual possession on the part of plaintiffs up to this time was such as can be held to have existed by reason of the occupancy by Garner and three men whom he employed, of the cabin on the southeast quarter of the section, and the fact that such men were there to watch the claim, and walked over the ground occasionally. The only alleged prosecution of any discovery work on the part of plaintiffs up to this time was that Mr. Davis, some ten days before May 26, 1908, had been negotiating with certain parties as to the amount that they would charge to place a drilling rig on this land, or as he put it "figuring" with them as to what they would charge. This resulted in nothing in the way of any arrangement, and it was as late as the middle of July, 1908, before any arrangement was made with anybody to procure a drilling rig. From the time that defendant commenced to move timber upon the north half of the northeast quarter on May 28, 1908, it was never out of actual possession thereof, and continued to diligently prosecute discovery work, ultimately, some time in the fall of 1908, finishing a well capable of producing oil in paying quantities. Some time subsequent to the commencement of the action, and in the early part of June, 1908, while defendant was enjoying actual possession of the land, engaged in prosecuting discovery work, Davis constructed a small cabin thereon, which was thereafter occupied by plaintiffs'

agents. About the middle of July plaintiffs commenced to place timber for a boring rig upon the land. They completed a rig there about July 22d or 23d, "spudded in" on August 31st and thenceforth prosecuted their discovery work with diligence, finally, some time after defendant's discovery, finishing a well.

We see no reason to doubt the validity of the locations of defendant's predecessors, made in the year 1899. The sixteen locators located the claims solely for their own individual benefit, and not as mere agents for the benefit of some other person or of some corporation in which they had no interest. The defendant corporation to which it was proposed to transfer the claims was to be one in which they were to be the sole stockholders, each to own one-sixteenth of the stock. As said in appellant's brief: "This is no case of dummy locators, lending their names to any person, or any corporation for the purpose of permitting it to acquire lands. This is a case of sixteen men locating, in apparent good faith, lands within the limit of the amount allowed to them, and adopting a corporate management as an appropriate means of regulating and handling their joint interests, and each retaining through the agency of the corporation, the exact interest in the land which he acquired under his location." The authorities, cited by respondents in this regard, have no application to such a situation, but refer to cases where a location is made by so-called "dummy locators," persons who simply loan their names as locators and act simply as the agents or employees of some person or corporation to whom they are to transfer their interest. Our own case of *Mitchell v. Cline*, 84 Cal. 409, [24 Pac. 164], cited by respondents, is one of such cases. There, as said by the court, three of the locators of one claim and five of another were "sham locators," not pretending to have any interest in the claim. "They merely permitted their names to be used as locators to enable their friends to obtain possession of and patent for more mineral land than they were entitled to by law, and they executed conveyances to such friends without any valuable or lawful consideration therefor." This was held to be contrary to the policy and object of the United States law limiting the quantity of placer mineral land which may be located by one person. In *Cook v. Klonos*, 164 Fed. 529, [90 C. C. A. 403], the

question, as stated by the court, was "whether an individual can, by the use of the names of his friends, relatives, or employees as dummies, locate for his own benefit a greater area of mining ground than that allowed by law." No reason is advanced or can be conceived why such a practice as was adopted in the case at bar can be held to be violative of any statute, rule, or policy relating to the disposition of mineral lands, and we know of no ruling to the effect that it is forbidden. (See in this connection Lindley on Mines, sec. 226.)

There was never, prior to the latter part of the year 1908, any discovery of oil or other mineral by defendant on the northerly location, sufficient to perfect the location. We do not think that the evidence was of such a nature as to establish any voluntary abandonment of this location by defendant, and we do not understand that the conclusion of the lower court was in any way based on the theory of an abandonment of the claim. Its express finding on the subject is not one of abandonment, but that any attempted location which defendant had made became forfeited by reason of the failure of defendant or its predecessors in interest to do or perform the assessment work required by law to be performed upon said land during the year 1907. Until a sufficient actual discovery of mineral is made on such a claim, a location is not perfected, and no question of the doing of annual assessment work is involved. It is only after such discovery, when actual possession is no longer necessary to protect the location against subsequent locators, that annual assessment work is essential to prevent a forfeiture.

The rights of the person or persons endeavoring to locate an oil claim, after the posting of notice, etc., are well settled by the decisions. Until the inchoate location is perfected by discovery, the locator has no vested right which Congress is obliged to recognize. But where his location is made in good faith, he has the right, as against third persons, which is transferable, "to be protected against all forms of forceable, fraudulent, surreptitious, or clandestine entries and intrusions, upon his possession," so long as he "remains in possession and with due diligence, prosecutes his work toward a discovery." (*Miller v. Chrisman*, 140 Cal. 440, 447, [98 Am. St. Rep. 63, 73 Pac. 1084]; *Weed v. Snook*, 144 Cal. 439, [77 Pac. 1023].) As long as such a condition continues, no one with-

out his consent can make the actual entry of the land essential to legally initiate a new location. But actual possession of the land coupled with continued diligent prosecution of discovery work are essential to his protection. "What the attempting locator has is the right to *continue* in possession, undisturbed by any form of hostile or clandestine entry, while he is diligently prosecuting his work to a discovery." (*McLemore v. Express Oil Co.*, 158 Cal. 559, [139 Am. St. Rep. 147, 112 Pac. 59].) "Where the alleged locator has not made a discovery and has not retained possession for the purpose of prosecuting work looking to a discovery, his mere posting of notice and marking of boundaries upon the ground will not serve to exclude others who may peaceably enter upon the land which he is not actually working or occupying." (*New England etc. Oil Co. v. Congdon*, 152 Cal. 211, 214, [92 Pac. 180, 181].) The case of *Belk v. Meagher*, 104 U. S. 279, [26 L. Ed. 735], does not hold otherwise. The location there involved was one perfected by discovery, or rather one where discovery preceded the posting of notice of location, and as we have said, actual possession is not essential after the location has been perfected by discovery. The requirement of diligent prosecution of the work was described in *McLemore v. Express Oil Co.*, 158 Cal. 559, [139 Am. St. Rep. 147, 112 Pac. 59], as follows: "This diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean the pursuit of capital to prosecute the work. It does not mean any attempted holding, by cabin, lumber pile, or unused derrick. It means the diligent, continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view." It is only one so actually possessed and so engaged in the diligent prosecution of the work of discovery, who is thus protected, by reason of his attempted location, against an entry by another.

As we have intimated, in view of what he have said, the situation was not such on May 26, 1908, that defendant could complain of an entry then made by another in good faith on the land embraced in its northerly location. Apparently it was not then in actual possession of any part thereof, or engaged in the diligent prosecution of discovery work thereon. Accordingly, plaintiffs were then entitled to locate the same

as an oil claim. They were entitled to go into actual possession thereof, post their notice of location, and continue in actual possession as long as they were diligently prosecuting discovery work thereon for the purpose of perfecting their location by discovery, protected against any re-entry on the part of defendant. But, as we have seen, their mere entry into possession and posting of a notice of location, without continuance of actual possession *and* continued diligent prosecution of discovery work, would not avail them. These things would serve only to protect them in their actual possession while they were engaged in diligently prosecuting discovery work.

As we have seen the trial court found in favor of plaintiffs upon the matter of actual possession and diligent prosecution of discovery work at the time defendant re-entered the land, and commenced its own discovery work thereon. This was one of the allegations of paragraph 5 of the complaint, all the allegations of which were found to be true by the trial court. The finding is a material one, as is apparent from what we have said.

As to the matter of possession, it appears without conflict that there was absolutely no one in actual occupancy of any part of the land embraced in plaintiffs' attempted location from the time of the posting of plaintiffs' notice to the time of defendant's re-entry, or indeed until some time during the following month, when Davis constructed a cabin thereon. The utmost effect of plaintiffs' evidence in this behalf was that men had been placed in a cabin on an adjoining tract of land, with directions simply to watch this land and walk over it once or twice a day. Whatever may be said as to this as being capable of sustaining a finding of actual possession, it is clear that the evidence is not sufficient to support the finding substantially to the effect that plaintiffs were engaged in the prosecution of discovery work at any time prior to the entry by defendant and the commencement of its own discovery work, or indeed to support a conclusion that they were so engaged at any time prior to the middle of July, long after the commencement of this action. Clearly, the mere "figuring" with other persons by the locator as to what they will charge for the doing of such work, or the making of an effort to find some one who will do such work at a price satis-

factory to the attempting locator, which is the utmost plaintiffs' evidence tends to show was done, cannot be held to constitute a diligent prosecution of the work of discovery, any more than the pursuit of capital to prosecute such work can be held to constitute such diligent prosecution. (See *McLemore v. Express Oil Co.*, 158 Cal. 559, [139 Am. St. Rep. 147, 112 Pac. 59].) Under the rule established by the decisions, the locator is protected in his possession only when engaged in the diligent prosecution of actual work for a discovery, and the commencement and continuance of such work are as essential when he complains of interference with his possession, as is the posting of his notice of location. We do not mean to hold that such diligent prosecution of the work may not include such actual preparation for the same as the bringing to the claim of the materials necessary therefor. We have no such situation presented by the evidence here, and need not determine exactly what will constitute the diligent prosecution of discovery work. Here we have nothing more than an indefinite "figuring" with other persons as to what they will charge for doing the work, if employed to do so, which by no stretch can be held to constitute a part of the actual prosecution of the work of discovery. It is urged that an attempting locator is protected in his possession without commencing such work, provided he does not allow an "unreasonable time" to lapse without making such a commencement, and this appears to have been the theory of the learned judge of the trial court as evidenced by one of his findings, where it is declared that plaintiffs "within a reasonable time thereafter commenced in good faith the work of developing the said land," etc. Such commencement, as we have seen, was long after defendant's re-entry and long after the commencement of this action. The rule declared by the decisions does not so provide. The attempting locator's possession is protected only while he may fairly be held to be actually engaged in such work as may reasonably be held to be discovery work.

It would seem to follow that as to defendant's northerly location, plaintiffs were not protected in their alleged possession at the time of defendant's re-entry on May 28, 1908, by reason of the posting of their notice of location. As we have said, it cannot be fairly held that plaintiffs had then com-

menced any work which by any stretch can be called discovery work. Until they had made such a commencement, the claim was as freely open to defendant under its location of September, 1899, as it would have been had no notice of location been posted by plaintiff. Learned counsel for plaintiffs are in error in claiming that the location of defendant's predecessors had been *forfeited*. Such would have been the situation if a discovery had been made on the claim and the location thus perfected, and there had been a subsequent failure to do the annual assessment work expressly made necessary by statute to avoid a forfeiture, coupled with a subsequent valid location by an adverse claimant. Defendant's northerly location had never been perfected by discovery. In the absence of a voluntary abandonment of all claims thereunder, it had the right to enter into possession of the land and do discovery work thereon at any time that it could do so without transgressing any right obtained by another. The alleged occupancy of plaintiffs was not of such a nature as to destroy or affect this right of defendant, and defendant in going again into possession and commencing discovery work on the land did not violate any right of plaintiffs.

In view of what we have said, it is apparent that the judgment must be reversed. A material finding essential to plaintiffs' right to prevail as to the land embraced in defendant's northerly location is not sufficiently supported by the evidence.

We have not considered what the effect on plaintiffs' claim as to the southerly half of said northeast quarter will be, if they finally fail to substantiate their claim as to the northerly half thereof, and as that question has not been argued, we shall not attempt to determine it here. As we understand the record, all of plaintiffs' development work has been done on the northerly half of said northeast quarter.

It is proper to say for the purpose of a new trial, that we see no good reason for doubting that the evidence was such as to support a conclusion that there was a sufficient discovery by defendant in 1899 or 1900 to perfect its location in so far as its southerly claim is concerned. Such would appear from the findings of the trial court to have been the view of the learned trial judge. The material question, then, in regard to the validity of such location at the time of plaintiffs' entry,

would appear to be whether defendant subsequent to such discovery had failed to do the necessary annual assessment work required by the United States statutes.

There is no other matter suggested in the briefs that appears to require discussion in this opinion.

The judgment is reversed.

Shaw, J., and Sloss, J., concurred.

Hearing in Bank denied.

[L. A. No. 3006. Department Two.—February 11, 1913.]

R. E. COFFMAN, Appellant, v. L. W. BUSHARD,
Respondent.

RESCISSION OF EXCHANGE OF LAND—JUDGMENT FOR RESTORATION OF PROPERTY—APPEAL BY PLAINTIFF FROM OTHER PORTIONS OF JUDGMENT—ACCEPTANCE OF DEED PENDING APPEAL.—Where a judgment was rendered in an action for the rescission of an exchange of land on the ground of fraud and deceit, directing a restoration to each of the parties of the property formerly owned by him, and also decreeing the payment by the plaintiff to the defendant of a certain sum of money laid out by the defendant upon the land received by him on the exchange, and authorizing the defendant to retain the amount of the income derived by him therefrom, and refusing to allow the plaintiff costs, the plaintiff, by accepting a deed to the property ordered to be restored to him, pending an appeal by him from those portions of the judgment that were against him, did not lose his right to further prosecute the appeal.

ID.—LIABILITY OF DEFENDANT FOR RENTS—REIMBURSEMENT FOR OUTLAYS.—Where the court found that the plaintiff was defrauded in the exchange, the judgment for the restitution of the property should also require the defendant to account to the plaintiff for the rents of the property received by him on the exchange, after reimbursement for his outlay thereon.

ID.—ARBITRARY FIXING AMOUNT OF OUTLAY.—Where the judgment decreed that the plaintiff should pay the defendant the amounts expended by him on account of the property received on the exchange, "provided said amounts are determined by agreement of the said parties or proofs to be presented to this court, within ten days," it was error for the court, in the absence of such agreement or

proofs, to arbitrarily fix the amount so expended, and to enter judgment against the plaintiff for such amount.

Id.—COSTS—PLAINTIFF ENTITLED TO AS MATTER OF RIGHT.—Notwithstanding such action was in equity, its purpose was the recovery of real property, and it involved the title of real estate. In such action the plaintiff, upon a judgment in his favor, was entitled to his costs as a matter of right, under subdivisions 1 and 5 of section 1022 of the Code of Civil Procedure.

APPEAL from portions of a judgment of the Superior Court of Orange County. Z. B. West, Judge.

The facts are stated in the opinion of the court.

F. C. Spencer, for Appellant.

H. V. Weisel, and Roger C. Dutton, for Respondent.

HENSHAW, J.—Plaintiff and defendant had by deeds effected an exchange of properties, plaintiff conveying to defendant a house and lot at Riverside, California, in exchange for a house and lot at Goldfield, Nevada, owned by defendant. This action was brought to rescind the sale upon the ground of fraud and deceit. The court found in accordance with the allegations of the complaint and decreed a rescission of the contract and a restoration to each of the parties of the property formerly owned by him. One of the frauds and misrepresentations was to the effect that the Goldfield property was rented for forty-two dollars a month. The court found that it was not rented, was not in a condition to be rented, that plaintiff had received no income of any kind from it, and had paid the taxes thereon, the amount so paid not being declared. It found that defendant had received three hundred and fifty-two dollars rents from the Riverside property. It further found that defendant had made outlays on account of the Riverside property for repairs, taxes, and interest upon a mortgage. It decreed, as has been said, a restoration to each of the parties of the property formerly owned by him; decreed payment by plaintiff to defendant of two hundred and twenty-five dollars laid out by defendant upon the Riverside property, and authorized the defendant to retain three hundred and fifty-two dollars,

the amount of the income derived by him from the Riverside property. And finally, it struck out plaintiff's cost-bill, refusing to allow him costs.

From these three several portions of the judgment plaintiff appeals. His appeal is met by a motion to dismiss. The facts upon which this motion is based are that, in accordance with the decree, defendant tendered the deed to the Riverside property, which plaintiff accepted, and plaintiff, in turn, made a like tender of his deed of the Nevada property. Upon this respondent insists that plaintiff has accepted the benefits of the judgment and, upon familiar principles, has waived his right to complain of it and so to appeal from it. (*San Bernardino Co. v. Riverside Co.*, 135 Cal. 618, [67 Pac. 1047].) But plaintiff has appealed only from certain portions of the judgment. Defendant has taken no appeal. There is thus no controversy whatsoever over the decree ordering a re-exchange and transfer of the properties. In accepting this portion of the judgment plaintiff takes only that which indisputably he is entitled to receive. His appeal is from minor portions of the judgment, in no way depending upon the transfer of the property decreed by the court. He insists that in certain minor particulars the decree does not do equity. His acceptance of his property under the indicated circumstances, the taking of that which indisputably is his, does not estop him from prosecuting his appeal and asserting his rights to other allowances which the court refused to grant. (*Hinchman v. Point Defiance Ry. Co.*, 14 Wash. 349, [44 Pac. 869]; *San Bernardino Co. v. Riverside Co.*, 135 Cal. 618, [67 Pac. 1047]; *Walnut Irrigation Dist. v. Burke*, 158 Cal. 165, [110 Pac. 517]; 2 Cyc. 653.) The motion to dismiss is therefore denied.

1. The findings disclose that plaintiff was defrauded, that he received no income from the Goldfield property, which was unrented and unrentable, and was obliged to expend some money in perfecting the title and in the payment of taxes. As against this, the decree permits the defendant actually to profit by his own fraud. He is reimbursed for all his outlay upon the Riverside property, and is allowed to retain three hundred and fifty-two dollars, the income derived from it. This is clearly inequitable. When defendant is reimbursed for his outlay, he has received all that in good

conscience he is entitled to receive. The decree should be modified in this respect, and defendant should be compelled to account for and pay over to plaintiff the three hundred and fifty-two dollars, rents of plaintiff's property.

2. The judgment decreed that plaintiff should pay the defendant "the amount expended by defendant for repairs of said real property at Riverside, California, and for interest on the mortgage on said property, provided said amounts are determined by agreement of the said parties or proofs to be presented to this court, within ten days from date hereof." The bill of exceptions shows that no agreement as to the amount so expended was entered into by the parties, and that no proof of the amount was presented to the court. Notwithstanding this, the court, upon motion of defendant's attorney, arbitrarily fixed the amount expended by defendant upon the Riverside property in the sum of two hundred and twenty-five dollars. It is insisted, and we think correctly, that an allowance so made without proof was in violation of the express terms of the judgment. The appeal upon this proposition is, therefore, well taken, and it is ordered that this item of two hundred and twenty-five dollars be stricken from the judgment, and that the trial court be directed to fix the amount, after the taking of evidence upon the question.

3. The court refused plaintiff his costs, evidently under the belief that the action was one embraced in the provisions of section 1025 of the Code of Civil Procedure. (*Gray v. Dougherty*, 25 Cal. 266; *Abram v. Stuart*, 96 Cal. 235, [31 Pac. 44]; *Bathgate v. Irvine*, 126 Cal. 135, [77 Am. St. Rep. 158, 58 Pac. 442].) While the action was based upon fraud and deceit, its real and declared purpose was the recovery of real property out of which plaintiff alleged he had been defrauded. That the action involved the title of real estate may not for a moment be doubted. The case, then, notwithstanding that it was an action in equity, comes clearly within the purview of section 1022 of the Code of Civil Procedure, and plaintiff was entitled to his costs as matter of right. (Code Civ. Proc., sec. 1022, subds. 1 and 5; *Hart v. Carnall-Hopkins Co.*, 103 Cal. 142, [37 Pac. 196]; *Murphy v. Crowley*, 140 Cal. 141, [73 Pac. 820]; *Gibson v. Hammang*, 145 Cal. 454, [78 Pac. 953].)

It is therefore ordered that upon the findings made by the court it correct its decree in the indicated particulars.

Melvin, J., and Lorigan, J., concurred.

[Sac. No. 1843. In Bank.—February 11, 1913.]

HENRY J. WIDENMANN, Respondent, v. GEORGE WENIGER, as Treasurer of the County of Solano, Appellant.

PARTITION—PROCEEDS OF SALE—FUND IN HANDS OF REFEREE—RIGHT TO SHARE A CHOSE IN ACTION.—A referee in a partition suit, is not, as to the proceeds of the sale of lands involved in the action, a mere bailee of a special fund or the custodian of earmarked money belonging to the co-owners of the land. He is the custodian of funds held by him for the use of the co-owners according to their interests, to be paid when the precise amounts due should be determined. The only appropriate action which one of such co-owners or his agents, could maintain against the referee, or his successor, for the recovery of his share of the money when due, would be either an action of debt or for money had and received to the use of the plaintiff in the action. The claim for such money is a pure chose in action.

ID.—ASSIGNMENT OF FUND—RIGHT OF PRIORITY—PURCHASER AT EXECUTION SALE.—As between successive assignees in good faith and for value of such chose in action, the mere fact that the second assignee acquired title as a purchaser at an execution sale against the co-owner originally entitled to the share of the fund, does not of itself entitle him to priority over a prior assignee who took by an assignment directly from such co-owner.

ID.—NOTICE TO REFEREES OF ASSIGNMENT—PRIORITY OVER SUBSEQUENT PURCHASER AT EXECUTION SALE.—A prior assignee for value of such chose in action, who immediately gave notice of the assignment to the referees in partition, is entitled to priority over a subsequent purchaser at an execution sale against the assignor, who purchased without any notice of the prior assignment.

ID.—DUTY OF ASSIGNEE TO GIVE NOTICE TO DEBTOR.—An assignee of a chose in action must do everything toward having possession that the subject admits, and as between successive assignees thereof, he will have the preference who first gives notice to the debtor, even if he be a subsequent assignee, provided at the time of taking it he had no notice of the prior assignment.

ID.—TRANSFER OF FUND BY REFEREE—TRANSFEREE LIABLE TO PAY TO PERSONS ENTITLED—NOTICE OF ASSIGNMENT TO CUSTODIAN OF FUND.—The fact that subsequent to the reception of the notice of the first assignment by the referees in partition, and after the court had made its decree confirming the partition sale, and directing the referees to pay a specific part of the fund to the assignor, they transferred the fund to the custody of the clerk of the court, who in turn transferred it to the county treasurer, there being no order of court for such transfers, and that the fund was in possession of the treasurer at the time of the execution sale to the second assignee, did not change the rights and priorities of the respective assignees. The prior assignee was not required to give a new notice of his assignment to the treasurer, in order to preserve his right of priority as against a possible subsequent assignee of his assignor, and the treasurer, in accepting the fund as a mere volunteer, with knowledge of its source and character, and of the duty of its possessor to pay it over to the persons entitled, charged himself with the obligation to pay it to such persons.

ID.—FAILURE TO GIVE NEW NOTICE—LACHES—ESTOPPEL.—Even if it be conceded that a new notice should have been given by the first assignee upon information of the transfer of the fund, he was not guilty of laches nor estopped to dispute the legality of a payment by the treasurer to the purchaser at the execution sale, if he notified the treasurer of the fact of his prior assignment and presented his claim before the treasurer made such payment.

ID.—EX PARTE ORDER OF COURT IN PARTITION SUIT FOR PAYMENT OF FUND—CUSTODIAN NOT PROTECTED IN PAYMENT TO PERSON NOT ENTITLED.—Where such fund was not paid into court in the partition suit, and the action was not continued for its disposition, as provided in section 774 of the Code of Civil Procedure, the court in that suit, after its order confirming the sale and directing the distribution of the proceeds by the referees had become final, had no authority to do anything further except to settle the accounts of the referees after they had made the payments as previously directed; and its subsequent order therein, made in a proceeding instituted by the execution purchaser against the treasurer, to which the prior assignee was not a party and of which he had no notice, directing the treasurer to make payment of the share of the fund to the execution purchaser, was insufficient to protect the treasurer in making such payment.

ID.—DEMAND ON CUSTODIAN—SHOWING OF FUTILITY OF DEMAND.—A demand by the prior assignee on the treasurer was not a condition precedent to an action to recover of him the chose in action assigned, where it is manifest, from the fact that the complaint in said action was served prior to the payment to the execution purchaser, that the demand would have been refused.

APPEAL from an order of the Superior Court of Solano County refusing a new trial. Henry C. Gesford, Judge presiding.

The facts are stated in the opinion of the court.

T. T. C. Gregory, Gaillard Stoney, and Orville C. Pratt, Jr., for Appellant.

Theodore A. Bell, for Respondent.

SHAW, J.—The defendant appeals from an order denying his motion for a new trial.

The plaintiff sued to recover the sum of \$4,875 alleged to belong to the plaintiff but which the defendant has in his possession and refuses to pay over to the plaintiff. The facts are as follows: In a suit in partition, entitled Catherine Magee et al., v. James Magee et al., pending in the superior court of Solano County, a sale of the land was ordered and R. J. R. Aden and two others were appointed as referees to make the sale. The sale was conducted by Aden, who, on April 23, 1908, sold the land to Henry Widenmann, the plaintiff, for ten thousand five hundred dollars, and received from him the purchase money. Widenmann bought the property at the instance of James Magee, who advanced to him one thousand five hundred dollars for that purpose, and it was the understanding between them that after the purchase from the referee was consummated Widenmann would resell the property to Magee. On May 1, 1908, Widenmann agreed to sell the land to Magee for ten thousand five hundred dollars and to convey the same as soon as the partition sale was confirmed. Magee owned one-half of the money realized on the partition sale, less the costs. On May 2, 1908, Magee, in writing, duly assigned to Widenmann all his interest in the partition money, the understanding between them being that the same when received was to be a part payment on the price of the sale of the land by Widenmann to Magee. The partition money was then in the hands of Aden, as referee, and Widenmann immediately gave notice in writing to said referees, including Aden, of his said assignment from Magee.

The referees afterward reported the partition sale to the court, and on August 6, 1908, the court made a decree confirming said sale, declaring the share of James Magee in the money to be \$4,875 and directing the said referees to distribute and deliver said sum to Magee. It does not appear that the referees mentioned the assignment in their report or that it is referred to in the decree. The code provides that the referees shall make the distribution of funds in such cases when ordered by the court. (Code Civ. Proc., sec. 773.) Aden did not deliver the money to Magee or to Widenmann. He did deliver it to G. G. Halliday, the clerk of the court, but without any order or authority to do so. No order had been or ever was made for such money to be deposited in court or with the clerk. The money was handed to the clerk by Aden on or about August 13th and it was transferred by the clerk to Weniger, the defendant, on or about August 15, 1908. This also was without any order of court or other authority.

Certain evidence was offered and apparently rejected, from which it appears that on April 27, 1908, in another action in said court, Catherine Magee and others recovered judgment against James Magee for \$4,877.82, that on August 18, 1908, an execution was issued on this judgment by the sheriff of said county, who on August 20, 1908, by virtue thereof, levied on the supposed interest of James Magee in the money then in the hands of Weniger, by serving on Weniger a notice of garnishment thereof, that Weniger answered to the effect that, as county treasurer, he was indebted to Magee in the sum of \$4,875, and that the sheriff thereupon advertised and sold the interest of Magee to T. T. C. Gregory, said sale being made on August 26, 1908. These documents further showed that Weniger refused to pay the money to Gregory, that thereupon on August 28, 1908, Gregory filed a petition to the superior court in the partition suit, asking for an order directing Weniger, as treasurer, to pay to him said money, that the court thereon issued an order to show cause against Weniger, returnable August 31, 1908, that the matter was continued by consent until September 21, 1908, that Weniger and Gregory then appeared, the matter was heard and the court thereupon made an order directing Weniger to pay the money to Gregory, which he accordingly did.

No notice of this proceeding was given to Widenmann or to Magee, and neither one of them appeared at the hearing. The minutes recited that Magee was "present in open court" on August 31, when one of the continuances was had, but it is not otherwise shown that he appeared at the proceeding or had knowledge thereof. The present action was begun on September 19, 1908. On September 17, 1908, Weniger was informed of the assignment to Widenmann and was cautioned not to pay the money to any other person. It does not appear that he had any previous notice of the assignment. The summons and complaint in the action had been served on Weniger prior to the hearing of Gregory's petition on September 21st. Whether or not the court, at that hearing, was advised of the assignment, the notice to Weniger, or the pendency of the present action, does not appear. There is no evidence that Gregory had any notice of the assignment at the time of the execution sale on August 28th to him.

The plaintiff claims that he obtained a perfect right to the payment of the money by reason of the assignment from Magee to him and the notice thereof given by him to Aden, who was then the debtor, that this right was not affected or divested by the subsequent transfer of the fund, first to the clerk and then to Weniger, nor by the execution sale to Gregory, or the subsequent order of the court. The defendant claims that by the purchase at the execution sale, without notice of the assignment, Gregory acquired a title superior to that of Widenmann, and that, whether this was so or not, the order of the court directing payment to Gregory is binding and conclusive on Widenmann and all other interested parties.

It is contended that this action is in the nature of an action of replevin to recover specific moneys in the hands of the defendant. But this is not the case. The money was not identified nor was its amount ascertained at the time of the transfer. Aden was not the mere bailee of a specific fund or the custodian of earmarked money belonging to Magee. He was the custodian of funds held by him for the use of Magee and others, according to their interests, to be paid when the precise amounts due should be determined. The only appropriate action which Magee, or his agents, could maintain against Aden, or his successor, for the recovery of the money when

due, would have been either an action of debt or for money had and received to the use of the plaintiff in the action. The claim assigned was, therefore, a pure chose in action. These propositions are settled by the following decisions: *Walling v. Miller*, 15 Cal. 38; *Wendt v. Ross*, 33 Cal. 650; *Dunsmoor v. Furstenfeldt*, 88 Cal. 522, [22 Am. St. Rep. 331, 12 L. R. A. 508, 26 Pac. 518].

The title acquired by Gregory under his purchase at the execution sale was no better or worse than the title he would have obtained if he had bought the claim privately from Magee without notice of the prior assignment. The execution sale gave him no additional rights and, of itself, it transferred to him only the title of Magee as it existed at the time of the levy. (Code Civ. Proc., sec. 699.) If, by reason of his ignorance of the prior assignment, he thereby took a title superior to that of Widenmann, this favorable situation comes from the fact that he was an innocent purchaser for value, and not from the fact that he bought at execution sale. There is no distinction in this respect between an execution sale and an ordinary sale. (*Mitchell v. Hockett*, 25 Cal. 544, [85 Am. Dec. 155]; *Harris v. Harris*, 64 Cal. 108, [28 Pac. 63]; *Southard v. McBrown*, 63 Cal. 546.) The case of *West Coast etc. Co. v. Wulff*, 133 Cal. 315, [85 Am. St. Rep. 171, 65 Pac. 622], and similar cases, relating to the rights of second assignees of corporation stock are cited by respondent on this point. They do not apply to the case. They rest entirely upon the provision of section 324 of the Civil Code, declaring that a transfer of such stock is invalid, except as to the parties thereto, unless it is entered on the books of the corporation. They depend upon the code provision and not upon the principle of the common law. Gregory and Widenmann, therefore, with relation to each other, stand in the positions, respectively, of successive assignees in good faith for value of the same chose in action, from the original purchaser. The question presented is which has the paramount title, under the facts shown.

The effect of such successive assignments and the rights of the successive assignees without notice, with respect to each other, were considered and decided in *Graham Paper Co. v. Pembroke*, 124 Cal. 117, [17 Am. St. Rep. 26, 44 L. R. A. 632, 56 Pac. 627]. There is some conflict of authority on the subject but this court approved and followed the English rule

stated as follows: "As between successive assignees of a chose in action, he will have the preference who first gives notice to the debtor, even if he be a subsequent assignee, provided at the time of taking it he had no notice of a prior assignment." "In the case of a chose in action you must do everything toward having possession that the subject admits; you must do that which is tantamount to possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of the fund; in case of a debt, for instance, notice to the debtor is, for many purposes, tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired title, in the actual possession and under the absolute control of another person."

It is suggested that the decision in *Curtin v. Kowalsky*, 145 Cal. 431, [78 Pac. 962], is contrary to the Graham case. This notion finds no support in the Curtin case. The rules governing the rights of successive assignees of the same chose in action were not involved in that case. Curtin was the first assignee, the second assignee was not a party to the action and there was nothing to show that he had given a prior notice nor was there any question in the case which made such notice material. The opinion expressly declares that "the rights of the second assignee are not involved and cannot be adjudged." We are at a loss to understand why the two cases are supposed to be in conflict. They discuss different rules, the parties stood in different relations, the facts are not the same and there is nothing in the opinion in the latter case that is inconsistent with the language of the former.

The result of the rule thus stated is that Widenmann's title to the demand was perfect at the time the execution was levied, and Magee then had no interest therein. Widenmann had obtained the assignment for a valuable consideration and had given notice thereof to Aden, the debtor, thus doing all that he could do toward taking possession. Gregory purchased Magee's title, only, and Magee having none, Gregory obtained none, unless some other fact in the case gives him the superior right.

The transfer of the fund to Weniger did not operate to change the rights and priorities of the respective claimants. The possession by Aden of the fund, a part of which belonged to Widenmann, made him, to that extent, the debtor of Widenmann. The transfer of this fund to Weniger carried with it the burden of the obligation attending its possession, the obligation to pay it over to the owner. He was, in effect, a volunteer. He accepted the money with knowledge of its source and character and of the duty of its possessor to pay it over to the persons entitled. The transfer to him made no change in the person entitled, nor in the rights of that person.

We can perceive no good reason for holding that Widenmann was required to give a new notice to Weniger of his assignment, in order to preserve his prior right to the obligation thus assumed by Weniger, as against a possible subsequent assignee of Magee. It does not appear that Widenmann was informed of the transfer of the fund to Weniger, until after the purchase by Gregory at the execution sale. He was informed of the transfer by Aden to Halliday but he was also informed by Halliday at the same time that he, Halliday, knew of the assignment from Aden to Widenmann. Consequently, no notice was necessary to hold Halliday liable, even if we concede that a new notice should have been given upon information of the transfer of the fund. So far as the question of laches or estoppel in favor of Weniger, arising from failure to notify Weniger, is concerned, Widenmann is completely exonerated by the fact that he gave such notice and presented his claim before Weniger paid the money to Gregory, and before the hearing upon which the court directed that payment, and so far as appears, immediately after he learned of the transfer to Weniger.

The conclusion from these considerations is that Widenmann's title to the chose in action, that is to the claim against Weniger, was superior to that acquired by Gregory at the execution sale.

The order of the court, made upon the petition of Gregory, was clearly insufficient to protect Weniger against the claims of Widenmann. The court had already made its final order in the partition suit, confirming the sale and directing the distribution of the proceeds by the referees (Code Civ. Proc., secs. 773, 785), no money had been paid into court and the

action was not continued thereafter for the disposition of any such money as provided in section 774 of the Code of Civil Procedure. The order had become final in that court. Nothing remained to be done by the court, except to settle the account of the referees after they had made the payments as previously directed. The money was not even *in custodia legis* so as to be exempt from execution. (*Dunsmoor v. Furstenfeldt*, 88 Cal. 522, [22 Am. St. Rep. 331, 12 L. R. A. 508, 26 Pac. 518]; *Estate of Nerac*, 35 Cal. 397, [95 Am. Dec. 111].) The proceeding by Gregory had no place in or legal connection with the partition suit. Giving it the most favorable effect in his behalf, it was in the nature of an independent proceeding to determine the title to the fund, although entitled in the partition suit. Weniger was made a party to it and notice was given to him. But Widenmann was not made a party. He was given no notice and he did not appear. And, although Weniger then knew of Widenmann's claim and of his rights under the prior assignment he did not ask that the latter be made a party, or that he be given notice, but, to the contrary, submitted to and obeyed an order made by the court in the absence of Widenmann and destructive of his rights. In order to place himself in a position to rely upon any order made in that proceeding, Weniger should have himself notified Widenmann of the proceeding and he should have asked the court to make Widenmann a party thereto and have him brought in by notice to defend his rights. Failing in this the order cannot avail Weniger as a protection.

It follows from the foregoing that if the court had admitted the evidence which it rejected touching Gregory's acquisition of the title to the chose in action, it would not have established a title superior to that of plaintiff, and the refusal to admit the proffered evidence was without injury. Nor, under the circumstances here indicated, was a demand upon appellant necessary before the commencement of the action. It is manifest that the demand would have been refused, since, treating the complaint itself as a demand, and remembering that the complaint was served before payment over by the appellant of the fund, appellant still refused to recognize the assignee's rights. (*Parrott v. Byers*, 40 Cal. 622.)

The order denying a new trial is affirmed.

Angellotti, J., Sloss, J., Henshaw, J., Melvin, J., and Lorigan, J., concurred.

[S. F. No. 6095. Department One.—February 13, 1913.]

ARTHUR CRANE, Appellant, v. FERRIER BROCK DEVELOPMENT COMPANY (a Corporation), Respondent.

VENDOR AND VENDEE—FALSE REPRESENTATIONS AS TO GOOD TITLE—WANT OF ANY TITLE BY VENDOR—RESCISSION BY VENDEE.—Where a vendor of land fraudulently induces the vendee to enter into the contract of purchase by representing that he has a good title to the land, when in fact he has none, nor any interest whatever therein, the vendee, upon discovering the falsity of the representation, may sue to rescind the contract and obtain a return of the money paid thereon.

ID.—PLEADING—RESTORATION BY VENDEE.—It is not essential to the statement of a cause of action for such a rescission for the complaint to aver a restoration to the vendor, where it fails to show that the vendee received anything whatever in performance of the contract.

ID.—POSSESSION BY VENDEE NOT PRESUMED—RIGHT TO POSSESSION.—There is no presumption of law that the vendee in an executory agreement for the purchase of land has been put into possession. In the absence of anything in the contract from which it can be inferred or implied that he is to have possession, he has no right thereto.

ID.—ABSENCE OF AVERMENT OF RESTORATION OF POSSESSION—MATTER OF DEFENSE.—The complaint in such action need not aver an offer by the vendee to restore possession, where there is nothing in the contract or in the allegations of the complaint to indicate that he ever had possession, or that the contract gave him the right thereto. If the vendor relies on the failure to make an offer to restore possession as a defense, it is incumbent upon him to allege and prove that the vendee was in possession at the time he demanded the return of the purchase money or at the time the action was begun.

ID.—PERFORMANCE BY VENDEE NEED NOT BE AVERRED.—The rule obtaining in cases where a contract for the sale of land was made in good faith, which requires the vendee, suing to recover the part of the purchase price paid upon discovering that the vendor had subsequently parted with the title, to offer to perform by paying or offering to pay the balance due upon the price, has no application to a suit for the rescission of the contract upon the ground that the vendor, having no title to the land, falsely represented to the vendee that he had the title thereto and thereupon and thereby induced the vendee to purchase.

Id.—CORPORATE STOCK TAKEN AS EQUIVALENT OF CASH—UNCERTAINTY OF COMPLAINT—RIGHT TO RECOVERY IN MONEY.—The complaint in the action for rescission, which avers that a part of the purchase price was paid in shares of stock in a corporation which were accepted by the vendor as the equivalent of a specified amount of cash, is not rendered uncertain by the failure to aver the name of the corporation. The fact that such shares were taken as cash, entitled the vendee to a return of the amount of money for which they were received.

APPEAL from a judgment of the Superior Court of Alameda County. William H. Waste, Judge.

The facts are stated in the opinion of the court.

Arthur Crane, *in pro. per.*, for Appellant.

James M. Koford, for Respondent.

SHAW, J.—The court below sustained a demurrer to plaintiff's fourth amended complaint and thereupon gave judgment for the defendant, from which plaintiff appeals.

The complaint contains many unnecessary allegations and these seem to have produced some confusion in the arguments. The following is a statement of the material facts alleged. On May 23, 1910, the defendant, a corporation, represented to plaintiff that it was seised in fee of a certain lot in a subdivision of land in Alameda County, known as "Cragmont," and thereupon offered to sell the same to plaintiff for the price of one thousand five hundred dollars of which five hundred dollars was to be paid in cash and the balance in monthly installments of fifteen dollars each; that in fact the defendant had no interest whatever in the lot; that the defendant, knowing that said representation was not true, made it to induce the plaintiff to enter into a contract to buy the lot from the defendant, on the terms above stated, and to make the cash payment thereon; that plaintiff believed said representation to be true, and, because of that belief, on the day above named, executed the contract referred to and paid to the defendant five hundred dollars on the price thereof; that he would not have done so but for the belief aforesaid; that on July 15, 1910, plaintiff paid a monthly installment of fifteen dollars on the price; that thereafter he discovered that said repre-

[S. F. No. 6095. Department One.—February 13, 1913.]

ARTHUR CRANE, Appellant, v. FERRIER BROCK DEVELOPMENT COMPANY (a Corporation), Respondent.

VENDOR AND VENDEE—FALSE REPRESENTATIONS AS TO GOOD TITLE—

WANT OF ANY TITLE BY VENDOR—RESCISSION BY VENDEE.—Where

a vendor of land fraudulently induces the vendee to enter into the contract of purchase by representing that he has a good title to the land, when in fact he has none, nor any interest whatever therein, the vendee, upon discovering the falsity of the representation, may sue to rescind the contract and obtain a return of the money paid thereon.

ID.—PLEADING—RESTORATION BY VENDEE.—It is not essential to the statement of a cause of action for such a rescission for the complaint to aver a restoration to the vendor, where it fails to show that the vendee received anything whatever in performance of the contract.

ID.—POSSESSION BY VENDEE NOT PRESUMED—RIGHT TO POSSESSION.—

There is no presumption of law that the vendee in an executory agreement for the purchase of land has been put into possession. In the absence of anything in the contract from which it can be inferred or implied that he is to have possession, he has no right thereto.

ID.—ABSENCE OF AVERMENT OF RESTORATION OF POSSESSION—MATTER OF DEFENSE.—The complaint in such action need not aver an offer

by the vendee to restore possession, where there is nothing in the contract or in the allegations of the complaint to indicate that he ever had possession, or that the contract gave him the right thereto. If the vendor relies on the failure to make an offer to restore possession as a defense, it is incumbent upon him to allege and prove that the vendee was in possession at the time he demanded the return of the purchase money or at the time the action was begun.

ID.—PERFORMANCE BY VENDEE NEED NOT BE AVERRED.—The rule obtain-

ing in cases where a contract for the sale of land was made in good faith, which requires the vendee, suing to recover the part of the purchase price paid upon discovering that the vendor had subsequently parted with the title, to offer to perform by paying or offering to pay the balance due upon the price, has no application to a suit for the rescission of the contract upon the ground that the vendor, having no title to the land, falsely represented to the vendee that he had the title thereto and thereupon and thereby induced the vendee to purchase.

ID.—CORPORATE STOCK TAKEN AS EQUIVALENT OF CASH—UNCERTAINTY OF COMPLAINT—RIGHT TO RECOVERY IN MONEY.—The complaint in the action for rescission, which avers that a part of the purchase price was paid in shares of stock in a corporation which were accepted by the vendor as the equivalent of a specified amount of cash, is not rendered uncertain by the failure to aver the name of the corporation. The fact that such shares were taken as cash, entitled the vendee to a return of the amount of money for which they were received.

APPEAL from a judgment of the Superior Court of Alameda County. William H. Waste, Judge.

The facts are stated in the opinion of the court.

Arthur Crane, *in pro. per.*, for Appellant.

James M. Koford, for Respondent.

SHAW, J.—The court below sustained a demurrer to plaintiff's fourth amended complaint and thereupon gave judgment for the defendant, from which plaintiff appeals.

The complaint contains many unnecessary allegations and these seem to have produced some confusion in the arguments. The following is a statement of the material facts alleged. On May 23, 1910, the defendant, a corporation, represented to plaintiff that it was seised in fee of a certain lot in a subdivision of land in Alameda County, known as "Cragmont," and thereupon offered to sell the same to plaintiff for the price of one thousand five hundred dollars of which five hundred dollars was to be paid in cash and the balance in monthly installments of fifteen dollars each; that in fact the defendant had no interest whatever in the lot; that the defendant, knowing that said representation was not true, made it to induce the plaintiff to enter into a contract to buy the lot from the defendant, on the terms above stated, and to make the cash payment thereon; that plaintiff believed said representation to be true, and, because of that belief, on the day above named, executed the contract referred to and paid to the defendant five hundred dollars on the price thereof; that he would not have done so but for the belief aforesaid; that on July 15, 1910, plaintiff paid a monthly installment of fifteen dollars on the price; that thereafter he discovered that said repre-

sentation was false and demanded the return of the money paid, which was refused. The contract, as alleged, provided that upon payment of the last monthly installment, which would become due on December 23, 1915, the defendant should execute to plaintiff a grant deed for said lot. It was further stated that four hundred and eighty dollars of the five hundred dollars cash payment aforesaid, was paid by delivering to defendant one thousand six hundred and fifty shares in a corporation of the par value of one dollar each, which the defendant accepted as cash. The prayer of the complaint was for a judgment that the contract be rescinded, that the defendant return to plaintiff the said five hundred and fifteen dollars so paid upon the price, or the personal property delivered as aforesaid to the defendant, and for general relief.

Where the vendor fraudulently induces the vendee to enter into the contract of purchase by representing that he has a good title to the land, when in fact he has none, nor any interest whatever in the land, the vendee, upon discovering the falsity of the representation, may sue to rescind the contract and obtain a return of the money paid thereon. There are numerous cases establishing this proposition: *Alvarez v. Brannan*, 7 Cal. 504, [68 Am. Dec. 274]; *Wright v. Carillo*, 22 Cal. 604; *Easton v. Montgomery*, 90 Cal. 316, [25 Am. St. Rep. 123, 27 Pac. 280]; *Morris v. Courtney*, 120 Cal. 65, [52 Pac. 129]; *Muller v. Palmer*, 144 Cal. 312, [77 Pac. 954]; 39 Cyc. 1264, 1417. The facts above stated bring the case within this rule. The complaint states a good cause of action to rescind the contract on the ground that it was procured by fraud and for the return of the purchase money paid thereon. It does not appear that the plaintiff had received anything whatever in performance of the contract and, consequently, there was nothing for him to restore to the defendant.

The objection was made that the complaint does not aver an offer by the plaintiff to restore possession. There is no presumption of law that the vendee in an executory agreement for the purchase of land has been put into possession. In the absence of anything in the contract from which it can be inferred or implied that he is to have possession, he has no right thereto. (*Gaven v. Hagen*, 15 Cal. 211; *Stratton v. California Land Co.*, 86 Cal. 364, [24 Pac. 1065]; *Gates v. McLean*, 70 Cal. 49, [11 Pac. 489]; 39 Cyc. 1620. There is

nothing in the contract or in the allegations of the complaint to indicate that the plaintiff ever had possession, or that the contract gave him the right thereto, or that he had taken possession, or that he now has possession. If the defendant desires to rely on the failure to make an offer to restore possession, it is incumbent upon it, therefore, to allege and prove by way of defense that the plaintiff was in possession at the time he demanded the return of the purchase money or at the time the action was begun.

The defendant relies on *Joyce v. Shafer*, 97 Cal. 335, [32 Pac. 320], and other cases of similar effect. These are cases where the contract was made in good faith and the vendee, upon discovering that the vendor had subsequently parted with the title, brought an action to recover the part of the purchase money which had been paid, without having himself offered to perform the contract by paying or offering to pay the balance due upon the price. They rest upon the principle that one who is himself in default cannot rescind the contract unless he has first offered to perform himself, and has unsuccessfully demanded performance by the vendor, thereby putting the vendor in default. In the case we have cited, in arguing this question, the court said: "One may sell land which he does not own, but yet be able, when the time for performance arrives, to furnish a good title. In the mean time the purchaser would not be at liberty to disaffirm the contract on the ground that *then* the vendor was unable to make a good title. It would be incumbent upon him to offer to perform, or to show that at the time of performance the vendor could not furnish the title." This is a true statement of the law as applicable to a suit to rescind the contract, or to recover the money paid thereon after a rescission upon the ground that the vendor has himself broken the contract. It has no application to a suit for the rescission of a contract upon the ground that the vendor, having no title to the land, falsely represented to the vendee that he had the title thereto and thereupon and thereby induced the vendee to purchase.

The demurrer contains many specifications wherein it is claimed that the complaint was uncertain. Among other things it specifies that it is uncertain because it does not give the name of the corporation, the shares of which were taken by the defendant as cash upon the payment of the first install-

ment. Inasmuch as the shares were accepted as the equivalent of money, we do not think that it was necessary to mention them at all in the complaint, or to describe them more particularly. The uncertainty was not upon a material point. The fact that the shares were taken as cash was also sufficient to give the plaintiff the right to demand the return of five hundred dollars in money. The other specifications of uncertainty relate to immaterial allegations in the complaint and it is not necessary to discuss them.

The demurrer to the complaint should have been overruled. The judgment is reversed.

Angellotti, J., and Sloss, J., concurred.

[L. A. No. 3291. In Bank.—February 18, 1918.]

MRS. S. M. HAYT, Respondent, v. GEORGE R. BENTEL,
Appellant.

VENDOR AND VENDEE—FAILURE TO PAY INSTALLMENTS WHEN DUE—BELATED TENDER—WAIVER OF DELAY BY VENDOR.—The rule that a vendee under a contract for the sale of land who has, without excuse, failed to make payments of installments of the purchase price as they fell due, cannot, by a belated tender, put the vendor in default and thus establish a right to recover the sums paid under the contract, does not apply to a case where the vendor has waived the delay in making payments.

ID.—TIME OF ESSENCE—FAILURE TO EXACT FORFEITURE—MATURITY OF ENTIRE CONTRACT PRICE—CONCURRENT CONDITIONS—OFFER OF PERFORMANCE BY VENDOR.—Where the vendor under a contract making time of the essence, and giving him the option, upon default of the vendee, to declare the whole purchase price due or to cancel the contract, re-enter and take possession of the premises and retain all moneys paid by the vendee as rent for use and occupation, permits the entire contract price to become due, without exercising his option to declare a forfeiture, the payment of the price then becomes a dependent and concurrent condition, nonpayment alone does not put the vendee in default, and the vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture, or maintain a suit either for the whole price, or for an intermediate installment.

ID.—LACHES OF VENDEE—DELAY OF VENDEE DOES NOT AFFECT RIGHT TO RESCIND—INABILITY TO GIVE GOOD TITLE.—Where the provision of such contract making time of the essence has once been waived, mere delay by the vendee, short of the statutory period of limitation, in making a tender, will not constitute laches, in the absence of a showing that the delay has prejudiced the vendor. Such delay would not affect the right of the vendee to rescind the contract for inability on the part of the vendor to make a good title.

ID.—ACCEPTANCE OF PART OF FINAL PAYMENT AFTER MATURITY.—The waiver by the vendor of the right to insist upon prompt payment is established by his acceptance of a part of the final installment of the purchase price long after it became due.

ID.—AGREEMENT TO PAY BALANCE AT TIME OF WAIVER.—After such a waiver has been made, the fact that the parties agreed, at the time the belated payment was accepted, that the vendee would pay the balance upon the delivery of the deed, is immaterial to the right of the vendee to subsequently rescind for inability of the vendor to give a good title.

ID.—DEFECT OF PARTIES—NONJOINDER OF HUSBAND OF MARRIED WOMAN AS PLAINTIFF—WAIVER OF OBJECTION.—The objection that the plaintiff was a married woman, and that her husband should have been joined with her, is in effect a plea of defect of parties plaintiff, which, if not taken by demurrer, where appearing on the face of the complaint, or by answer, is deemed waived. A mere denial in the answer of an allegation in the complaint that the plaintiff is an unmarried woman is insufficient to set up such plea.

ID.—INTEREST ON INSTALLMENTS NOT ALLOWED.—An action by the vendee to recover installments of the purchase price paid, on account of the inability of the vendor to give a good title, is in effect an action for money had and received, in which the right is based upon a want or failure of consideration. Until rescission, or a demand for repayment, nothing was due, and interest on such installments from the time of their payment is not recoverable. No different conclusion would follow if the action were construed as one based on fraud.

ID.—ABSENCE OF SHOWING OF POSSESSION BY VENDEE—FAILURE TO OFFER TO RESTORE POSSESSION.—In such action, where neither the complaint nor answer averred that the vendee ever received or took possession of the land contracted to be sold, the vendee's notice of rescission was not rendered ineffectual for want of an offer to restore the possession. An averment in the complaint that the parties agreed for possession by the vendee, does not show that possession was in fact delivered.

ID.—POSSESSION BY VENDEE NOT PRESUMED.—It will not be presumed in such action, for the purpose of overthrowing a judgment for the vendee, that the possession was in the vendee.

ID.—PLEADING—RECITALS IN CONTRACT EMBODIED IN COMPLAINT.—Recitals in a contract incorporated in a complaint will not supply the want of essential averments in the pleading. Consequently, the mere annexing to the complaint of a contract providing that the purchaser shall have possession cannot be treated as equivalent to an averment that possession was in fact transferred.

ID.—RESCISSION OF CONTRACT MAY BE HAD IN ACTION.—Even if the contract had not been formally rescinded by the vendee before the commencement of the action, that relief could be had under a prayer therefor in the complaint.

APPEAL from a judgment of the Superior Court of Los Angeles County. George H. Hutton, Judge.

The facts are stated in the opinion of the court.

H. C. Millsap, and Millsap & Sparks, for Appellant.

Smith, Miller & Phelps, for Respondent.

SLOSS, J.—On June 29, 1905, the parties entered into a written contract for the purchase by plaintiff from defendant of a lot in the city of Ocean Park, county of Los Angeles. The purchase price was eight hundred and twenty-five dollars, of which two hundred and seventy-five dollars was to be paid on the signing of the agreement, two hundred and seventy-five dollars on or before the twenty-ninth day of June, 1906, and two hundred and seventy-five dollars on or before the twenty-ninth day of June, 1907, deferred payments to bear interest at the rate of seven per cent per annum, payable semi-annually. Time was made of the essence. By the contract, a copy of which is annexed to the complaint, the purchaser was to have immediate possession of the premises, and was to pay all taxes and assessments levied against the property. It was provided that in case of default on the part of the plaintiff, defendant at his option might declare the whole sum due, or might cancel the contract, re-enter and take possession of the premises, and retain all moneys paid by plaintiff as rent for use and occupation. Upon payment of all sums due from plaintiff, defendant agreed to execute and deliver to plaintiff a good and sufficient bargain and sale deed together with a certificate of title showing a title, free and clear of encumbrances, to be vested in plaintiff.

The complaint alleges that plaintiff made the following payments:

On June 29, 1905.....	\$275.00
July 16, 1906, as principal.....	275.00
July 16, 1906, interest on deferred pay- ments.....	38.50
October 29, 1908, on principal.....	50.00
October 29, 1908, interest on deferred payments to December 29, 1908..	48.15
<hr/>	
Total.....	\$686.65

It is alleged that on October 29, 1908, plaintiff paid and defendant accepted fifty dollars on the third installment, together with interest upon all deferred payments to and including December 29, 1908; that it was then understood and agreed between the parties that as soon as the deed was executed and delivered to plaintiff she would pay the balance due. Plaintiff has ever since, as she alleges, been ready and willing to pay such balance. On October 15, 1909, plaintiff tendered defendant such balance, and demanded a deed and certificate of title, but defendant refused to execute such deed, and informed plaintiff that he could not deliver a conveyance or certificate, inasmuch as the title to the property was encumbered and defective, and had been so at all times since the execution of the contract. A subsequent tender and demand in writing are set forth, together with refusal by defendant, followed by a notice of rescission from plaintiff to defendant, with a demand for repayment of all sums paid under the contract. The complaint alleges, further, that at the time of the execution of the contract the property was not free from encumbrances, but the title was then, and has ever since been clouded; that these facts had at all times been known to defendant, but not known by plaintiff until October 15, 1909, and that all moneys obtained by defendant from plaintiff had been taken and received in fraud of plaintiff's rights.

The prayer of the complaint was that the contract be rescinded, and that plaintiff recover the moneys paid by her under the contract, with interest.

The answer denied a number of the foregoing allegations. The findings were in favor of all the averments of the complaint. Judgment was given in favor of plaintiff for \$891.30,

being the sum of the various amounts paid by her under the contract for principal, interest, and taxes, together with interest from the date of each payment.

The defendant appeals from the judgment, bringing up the evidence by means of a bill of exceptions.

There is no merit in the appellant's claim that, on the facts alleged and found, the plaintiff is not entitled to any relief, because she had been in default in making payments under the contract. In this regard, reliance is placed upon *Glock v. Howard etc. Co.*, 123 Cal. 1, [69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713]. In the opinion in that case, the *status* of a defaulting purchaser under a contract for the sale of real estate is fully discussed, and the rule declared that such a purchaser, who has, without excuse, failed to make payment of installments as they fell due, cannot, by a belated tender, put the seller in default and thus establish a right to recover the sums paid under the contract. But this undoubtedly sound doctrine does not apply to a case where the vendor has waived the delay in making payments. Such waiver is alleged and found here. On October 29, 1908, the plaintiff was in default. On that date she paid to the defendant, and the latter accepted, the sum of \$98.15, being fifty dollars on account of principal, and \$48.15 for interest to December 29, 1908. The time for the payment of all installments had then elapsed; indeed, the final payment was already, under the terms of the contract, past due. These facts bring the case precisely within the principle declared in *Boone v. Templeman*, 158 Cal. 290, [139 Am. St. Rep. 126, 110 Pac. 947]. There the court declared the rule to be that where the vendor, under an agreement like the one before us, permits the entire contract price to become due, without exercising his option to declare a forfeiture, "the payment of the price then becomes a dependent and concurrent condition, nonpayment alone does not put the vendee in default, the vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture, or maintain a suit either for the whole price, or for an intermediate installment." The same case lays down the doctrine that, where the provision making time of the essence has once been waived, mere delay by the vendee, short of the statutory period of limitation, in making a tender will not constitute laches in

the absence of a showing that the delay has prejudiced the vendor. In *Boone v. Templeman*, the vendee was permitted to maintain a suit for specific performance. If delay in tendering payment did not deprive him of the right to this relief the delay of the plaintiff in this case could not affect her right to rescind the contract for inability on the part of the vendor to make a good title. The waiver of the right to insist upon prompt payment is established by the acceptance of a part of the final installment long after it was due. The allegation and finding that the parties then agreed that plaintiff would pay the balance upon delivery of the deed is immaterial. It is of no importance, therefore, to consider the point made by appellant that the evidence does not sustain this finding. The alleged agreement provided for no more than would, as we have seen, be implied in law from the waiver of the delay in payment. The views expressed render it unnecessary, also, to pass upon the respondent's claim that the party first in default was the defendant, who made the contract with knowledge that he could not give a good title.

The complaint alleges, and the answer denies, that plaintiff is an unmarried woman. There is a finding in favor of the averment of the complaint. The appellant assails the finding as unsupported. The point made is that, if plaintiff was a married woman, her husband should have been joined with her. (Code Civ. Proc., sec. 370.) But this objection, if otherwise well founded, should have been specially set up by answer. It amounted to a plea of defect of parties plaintiff, which, if not taken by demurrer (where appearing on the face of the complaint), or by answer, is deemed waived. (Code Civ. Proc., sec. 434; *Grain v. Aldrich*, 38 Cal. 514, [99 Am. Dec. 423]; *Work v. Campbell*, ante, p. 343, [128 Pac. 943].) A mere denial that plaintiff is an unmarried woman does not constitute a plea of defect of necessary parties plaintiff.

It is argued that the court erred in allowing plaintiff interest on the sums paid by her from the dates of the respective payments. We think this position is well taken. In the absence of an agreement to pay interest, the law "only awards interest upon money from the time it becomes due." (*City of Los Angeles v. City Bank*, 100 Cal. 22, [34 Pac. 510]; Civ. Code, sec. 1917.) Plaintiff's suit was not based upon any provision of the contract. It was an action for money had and

received, in which the right was based upon a want or failure of consideration. (*Thomas v. Pacific Beach Company*, 115 Cal. 136, [46 Pac. 899].) Until rescission, or a demand for repayment, nothing was due, and interest was not allowable. (*Hellman v. Merz*, 112 Cal. 661, [44 Pac. 1079].) No different conclusion would follow if, as urged by respondent, the action be viewed as one based on fraud. Even in that aspect, no money was due plaintiff until she exercised her right to demand the return of the sums paid.

The point is made that since, under the contract, the plaintiff was entitled to possession of the premises, her notice of rescission was ineffectual for want of an offer to restore such possession. But there is no allegation, in either the complaint or the answer, that plaintiff ever did receive or take possession of the lot. The contract is annexed to the complaint and made a part thereof. But all that is *averred* is that the parties made an agreement for possession, not that possession was in fact delivered. Recitals in a contract incorporated in a complaint will not supply the want of essential averments in the pleading. (*Mayor etc. of L. A. v. Signoret*, 50 Cal. 298; *Burkett v. Griffith*, 90 Cal. 532, [25 Am. St. Rep. 151, 13 L. R. A. 707, 27 Pac. 527]; *Estate of Cook*, 137 Cal. 191, [69 Pac. 968].) The rule is well illustrated by the case of *Hibernia S. & L. Soc. v. Thornton*, 117 Cal. 481, [49 Pac. 578]. There an action was brought upon a promissory note. The complaint alleged the making of the note, setting forth a copy thereof, demand, and nonpayment. The note contained the following clause: "This note secured by a mortgage of even date herewith." The defendant contended that the recital showed that the note was secured by mortgage, and that plaintiff's only remedy being to sue for foreclosure (Code Civ. Proc., sec. 726), an action on the note alone could not be maintained. But the court declined to give such effect to the recital, saying "There is . . . no averment in the complaint that the note was secured by a mortgage, and the recital to that effect in the note cannot, as matter of pleading, be treated as the equivalent of such averment. It is only by inference or argument from this recital that it can be assumed that a mortgage was ever executed, and the rule is as much in force under the code as at common law that argumentative pleading is not permissible." For like, if not stronger, reasons the

mere annexing to the complaint of a contract providing that the purchaser shall have possession cannot be treated as equivalent to an averment that possession was in fact transferred. To give such effect to the language of the complaint would be, in effect, a holding that the mere pleading *in haec verba* of a contract constituted an allegation that all of its terms had been performed.

There is, therefore, nothing on the record to show in whom the possession of the lot was during the life of the contract or at the time of the judgment. We will not presume, for the purpose of overthrowing the judgment, that such possession was in plaintiff. If the defendant had desired to protect his rights in this regard, he should have made them appear by pleading or otherwise before the proceedings in the trial court were concluded.

We have not thought it necessary to consider whether plaintiff's rights accrued by reason of her notice of rescission. Even if the contract had not been rescinded before the commencement of the action, the complaint prayed that it be rescinded by the judgment of the court. This was a proper form of relief. (Civ. Code, sec. 3406.)

There are no other points requiring notice.

The cause is remanded, with direction to the trial court to modify the judgment by deducting from the amount recovered all sums shown by the findings to have been allowed as interest for any period prior to the fourth day of February, 1910, the date of the demand for repayment. As so modified the judgment shall stand affirmed.

Angellotti, J., Shaw, J., Melvin, J., and Henshaw, J., concurred.

[L. A. No. 2844. In Bank.—February 13, 1913.]

MARY M. WINSLOW, Respondent, v. GLENDALE LIGHT
& POWER COMPANY, Appellant.

EMPLOYER AND EMPLOYEE—NEGLIGENCE—INDEPENDENT CONTRACTOR—

EVIDENCE—CONCLUSION OF WITNESS AS TO EMPLOYMENT.—In an action to recover damages for alleged negligence, in which the defense was that the negligent act was that of an independent contractor and not of an agent of the defendant, the question of employment is itself in controversy, and a witness should not be permitted to testify to his conclusion that he was working for the defendant. His testimony should be limited to a statement of the person by whom he was employed, the nature, terms, and surrounding circumstances of his employment. From these, and such other evidence as the case presents, the conclusion is to be drawn as to who was in fact the responsible employer.

· ID.—MISTAKEN CONCLUSION OF WITNESS AS TO EMPLOYMENT—EVIDENCE CONCLUSIVELY ESTABLISHING CONTRARY.—Assuming, under the doctrine of the law of the case, as mistakenly held on a prior appeal herein, that a witness could testify to such a conclusion as to his employment, his testimony on his direct examination that he was employed by the defendant, will not suffice to sustain a verdict against the defendant, if his cross-examination and the other evidence in the case show without conflict that he was employed by and was working for an independent contractor.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Leon F. Moss, Judge.

The facts are stated in the opinion of the court.

Tanner, Taft & Odell, for Appellant.

Drew Pruitt, W. O. Morton, and M. A. Fleming, for Respondent.

HENSHAW, J.—This action was brought to recover damages for personal injuries sustained by plaintiff. She was seventy-six years of age at the time she received the injuries complained of, and these injuries were occasioned by her tripping over a wire stretched across the sidewalk. This wire was admittedly a wire of the defendant, the Glendale Light &

Power Company. That company's principal defense to the action was that, having been ordered by the city to remove certain poles and wires, it employed an independent contractor to do the work, that the work was done wholly under the management and control of this independent contractor, and that it was through the negligence of his employees, and not the employees of the defendant Light and Power Company, that the accident occurred. Reference may here be made to a former appeal taken in this case and reported in 12 Cal. App. 530, [107 Pac. 1020]. By the decision upon the first appeal the judgment was reversed. A second trial followed, resulting in a judgment in favor of the plaintiff. From that judgment and the order denying defendant's motion for a new trial an appeal was taken, resulting in an affirmance of the judgment and order by the court of appeals. Upon the first trial, one of the men at work removing the poles and wires was permitted to testify, over the objection of the defendant, that he was "working for the Glendale Light & Power Company." Upon the appeal reported in 12 Cal. App. it was held that the objection was not well taken, and that the question was permissible and its answer admissible. Upon the second appeal the court of appeals, seemingly feeling itself bound under the doctrine of the law of the case, held that the same questions asked upon the second trial were permissible, and decided, further, that the answers to these questions presented evidence sufficient to raise a conflict upon the principal question in the case,—namely, whether the work was being done by the defendant or by an independent contractor, for whose conduct defendant was not legally responsible. It was for the further consideration of this proposition that a hearing before this court was ordered. But lest by our silence it may be thought that this court approves the determination as to the permissibility of the question discussed in the opinion in 12 Cal. App., it is proper to say that in many instances—as where the agency or the ownership of property is not in issue, it is permissible, for the purpose of curtailing the inquiry, to allow questions to be asked and answered, which questions and answers would be to the last degree improper were issue joined upon the question of agency or ownership. Instances come readily to mind, and, indeed, in the courts are of daily or even of hourly occurrence. If the ownership of a piece of

land is not in issue, it is not objectionable to ask the witness who owns that land. If the agency or employment is not in question, it is equally permissible to ask the witness whose agent he was, or for whom he was working. It is but a time-saving method of presenting the truth upon a matter not controverted. Very different, indeed, must be and is the rule where the ownership or the agency is itself in dispute. For a man, under such circumstances, to be permitted to say that he owns the property is to permit him to state a conclusion which must be drawn from all the facts by court or jury. To permit, where the question of employment is itself in controversy, a witness to testify that he was working for this person, is to allow in evidence the incompetent conclusion of the witness upon a matter of vital controversy. In such a case the rule limits the testimony of the witness to a statement of the person by whom he was employed, the nature, terms, and surrounding circumstances of his employment. From these, with such other evidence as the case presents, must the conclusion be drawn as to who in fact was the responsible employer.

So much we think it proper to say in pointing out the true rule. But the matter here in controversy will be considered under the doctrine of the law of the case, as that law was laid down, though mistakenly, in the opinion in the 12 Cal. App. above cited. So treating it, the ruling amounts to this, but to this only: that it was competent for the witness to answer the question, and he did answer it by saying that he was working for the Glendale Light & Power Company. Nothing, however, in the decision of the court of appeals goes to the weight of this testimony, and a review of the evidence in the case satisfies us that this testimony is without weight, and is so wholly unsubstantial as not to raise a controversy over the fact. The evidence introduced on behalf of the defendant is clear, conclusive, and undenied, and establishes that Seaman was employed as an independent contractor to do the work, and did undertake its performance under his contract. The defendant had no control and exercised no control over the employees of Seaman, and two of those employees who were actually engaged in the work were Harvey and Allen. Neither Harvey nor Allen was ever in the employ of the defendant company. Such was the uncontroverted evidence of the defendant, and it remains to be considered whether the

testimony of the witness Harvey is sufficient to raise a conflict. Harvey was asked the question "By whom were you employed and for whom were you working on February 27, 1907" (the date of the accident), and made answer, "For the Glendale Light & Power Company." Again, testifying that he was at the scene of the accident, he concludes his answer by saying "I was on duty." He is immediately asked the question, "On duty for whom," and replies, "The Glendale Light & Power Company." The facts elicited from the witness upon cross-examination show that these declarations were but the conclusion of the witness, and demonstrate that the conclusion is without basis in truth. Confronted with his testimony given upon the former trial, and with his statements therein contained to the effect that he was employed by Mr. Seaman, he discredits his former testimony, saying, as to some of his answers, that he did not remember; as to others, that when he said he was employed by Mr. Seaman, "I might have said he was the foreman who hired me." Asked further if he did not reply upon being asked for whom he was working, that he was working for Seaman, he answered, "Well, I said he was my employer." Passing over his testimony upon the first trial, and coming to the testimony on the second trial, he was asked the direct question, "What person employed you," and he replied, "Mr. Seaman." He testifies that nobody beside Mr. Seaman told him to do any work on the job; that no officer of the Glendale Light & Power Company ever ordered him to go on the work. He had no knowledge whatsoever of the contract Mr. Seaman had with the light and power company, and, finally, he answers "Yes" to the question, "When you say you were working for the Glendale Light & Power Company it was because you were working on their lines, was it not, and because Mr. Seaman there was evidently doing the work for them?" It is shown that Mr. Seaman had a shop in town, his own tools, wagon, and employees, and paid his own workmen, of whom the witness was one; that Harvey was engaged upon other work and jobs besides this one and was always paid by Mr. Seaman. The circumstance that upon one or another occasion he was paid by Mr. Seaman with the check of the defendant company is without significance. It is in direct and undisputed evidence that the check was not drawn to his (Harvey's) order, and that the defendant com-

pany paid Seaman by checks. (*Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 577, [93 Pac. 377].)

The witness Harvey was not only permitted to testify that he was employed by the Glendale Light & Power Company, but he was allowed even greater latitude, and was permitted to testify that his fellow workman Allen was also working for the Glendale Light & Power Company at the time of the accident. But as, under cross-examination, he answers that his testimony as to Allen's employment is based upon the same knowledge and facts which he had related concerning his own employment, no amplification of this matter becomes necessary.

What, then, results from this evidence? Nothing more than that the conclusion of the witness, which he has been allowed improperly to express, is shown to rest upon no basis of fact, the facts being that the witness was employed by Seaman and by nobody else, was paid by Seaman and by nobody else, worked under the direction of Seaman and nobody else, knew nothing of any arrangement which Seaman might or might not have with the Glendale Light & Power Company for the doing of the work; but, because the work was Glendale Light & Power Company work, the witness believed that Seaman was the foreman, and believed that the work was being done under the direction of the Glendale Light & Power Company, and believed that the Glendale Light & Power Company was his employer. No conflict is raised by evidence such as this. All of the evidence establishes that Seaman was an independent contractor, and the judgment and order are therefore reversed.

Melvin, J., Angellotti, J., Sloss, J., and Shaw, J., concurred.

[S. F. No. 5789. Department One.—February 14, 1913.]

**MARIA S. MARCUCCI and ANTONIO MARCUCCI, Appel-
lants, v. F. W. VOWINCKEL, Respondent.**

APPEAL BY NEW METHOD—REVIEW OF EVIDENCE—NEGLIGENCE—FAILURE TO EMBODY EVIDENCE IN BRIEF OR OTHERWISE IDENTIFY IT.—On an appeal taken by the new method by the plaintiff from a judgment of nonsuit in an action to recover damages for the alleged negligence and want of skill of the defendant, as a physician and surgeon, it will be assumed that there was no evidence of such want of care or skill, when counsel for the appellant omits to print in his brief any part of the testimony on that subject, as required by section 953c of the Code of Civil Procedure, or to refer to any part of the record where it is contained, or to argue the question at all.

ID.—CONTINUANCE OF TRIAL—ATTENDANCE OF WITNESS—WANT OF DILIGENCE—DISCRETION.—It was not an abuse of discretion for the trial court to refuse to continue the trial of such case from the afternoon of the last day thereof until the following morning, in order to give the plaintiffs an opportunity to secure the attendance of three additional unnamed witnesses, when there was an entire absence of any showing of diligence made in support of the application for continuance, and no affidavit was made or proposed to be made, and it was not shown that any subpoena had been issued or served on them, or that they had promised to attend then, or at any other time, or that they would, if examined, testify to any material fact, or that they knew anything about the facts of the case, or what counsel expected to prove by them.

ID.—DISCRETION OF TRIAL COURT RESPECTING CONTINUANCES.—Continuances should not be granted without good cause, and the granting or refusing thereof is usually a matter largely within the discretion of the trial court. An abuse of discretion must be shown to justify a reversal of the judgment because of a ruling on such matters.

ID.—NOTICE OF APPEAL—NOTICE TO CLERK TO PREPARE TRANSCRIPT.—The notice to the clerk requesting the preparation of a transcript on appeal, being the notice provided for by section 953a of the Code of Civil Procedure, given in the form there prescribed and without other appropriate words, is not a good notice of appeal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Wal. J. Tuska, for Appellants.

Chickering & Gregory, and Stanley Moore, for Respondent.

SHAW, J.—At the conclusion of plaintiffs' evidence, the court below, on motion of defendant, granted a nonsuit, on the ground that the evidence did not tend to show negligence or unskillfulness on the part of the defendant. From the judgment of dismissal thereupon given, the plaintiffs appeal.

The plaintiffs seek to recover damages from defendant for injuries sustained by the plaintiff, Maria, wife of plaintiff, Antonio, from the alleged negligence and want of skill of defendant, as a physician and surgeon, in advising her that a surgical operation upon her was necessary and in the performance of said operation. The transcript on appeal consists of a copy of the judgment-roll and a reporter's transcript of the evidence and proceedings at the trial, neatly typewritten, prepared and certified, as provided by sections 953a and 953c of the Code of Civil Procedure. Counsel for the appellants does not print in his brief, or at all, any part of the testimony or evidence on the subject of want of care and skill on the part of the defendant, as he is required to do by section 953c, aforesaid, where he desires to call the attention of the court to the evidence. Nor does he in his brief point out or refer to such evidence on the part of the record where it may be found. He does not argue the question at all. We will therefore assume, for the purposes of this review, that there was no evidence of such want of care or skill.

The only point worthy of mention, presented in the brief, is the claim that the court below improperly refused to continue the trial from the afternoon of the last day thereof until the following morning, to give the plaintiffs an opportunity to procure the attendance of three additional witnesses to testify on behalf of the plaintiffs. The record does not show at what time in the afternoon this refusal occurred. Plaintiffs' counsel say it was at half past three o'clock. There was no showing of any diligence whatever made in support of the application for the continuance. No affidavit was made, or proposed to be made. It was not shown that any subpoena had been issued or served on the proposed witnesses, or that they had promised to attend then, or at any other time, or that they would, if examined, testify to any material fact, or that

they knew anything about the facts of the case, or what counsel expected to prove by them. Their names were not even stated. The court offered to delay the proceedings half an hour to enable plaintiffs to procure their attendance, but their counsel stated that the office hours of the witnesses were such that he could not procure their presence on that day, but he did not state where they resided, whether in San Francisco, or elsewhere.

Continuances should not be granted without good cause. The granting or refusing thereof is usually a matter largely within the discretion of the trial court. An abuse of discretion must be shown to justify a reversal of the judgment because of a ruling on such matters. It cannot justly be claimed that good cause was here shown for a continuance. We cannot say that the lower court abused its discretion.

The other rulings complained of relate to the admission or exclusion of evidence. The trial was before the court, without a jury. None of the rulings operated to prevent the plaintiffs from introducing any substantial evidence of the want of care or skill complained of, and all of them were upon trivial matters. They could not have affected the substantial rights of the plaintiffs. We do not think it necessary to discuss them. The failure to prove want of care or skill would justify the nonsuit even if these rulings had been favorable to plaintiffs.

The transcript of the record does not contain any notice of appeal. There is a notice to the clerk requesting the preparation of a transcript on appeal, being the notice provided for by section 953a, aforesaid. Because of the frequent misunderstanding of the effect of this section, we repeat that it does not provide for a notice of appeal and that a notice given under it, in the form there prescribed and without other appropriate words, is not a good notice of appeal. (*Smith v. Jaccard*, 20 Cal. App. 280, [128 Pac. 1026]; *Boling v. Alton*, 162 Cal. 298, [122 Pac. 461]; *Lent v. California F. G. Assoc.*, 161 Cal. 719, [121 Pac. 1002].) Counsel for respondent do not raise the objection, and we therefore assume that a proper notice of appeal was filed, and that its insertion in the record was waived.

The judgment is affirmed.

Sloss, J., and Angellotti, J., concurred.

[Crim. No. 1744. In Bank.—February 18, 1913.]

**THE PEOPLE, Respondent, v. FRANK BAUWERAERTS,
Appellant.**

CRIMINAL LAW—MURDER—EVIDENCE.—In a prosecution for murder, the evidence is held sufficient to justify the conviction of murder in the first degree.

ID.—ABSENCE OF MOTIVE—REASONABLE DOUBT.—The absence of motive is a fact favorable to one accused of crime, and is to be considered in weighing the evidence against the defendant. But, of itself, it does not, as matter of law, establish innocence or necessarily raise a reasonable doubt of guilt. Its effect is a question for the jury to decide.

ID.—CROSS-EXAMINATION OF DEFENDANT—IMPEACHMENT—CONVICTION OF FELONY—MISCONDUCT OF DISTRICT ATTORNEY—REPETITION OF QUESTION.—The defendant in a criminal prosecution, where he offers himself as a witness, may be asked, for the purposes of impeachment, if he has not been convicted of a felony; and the repetition of the question in different forms, after a negative answer had been given to the first question, will not be deemed prejudicial misconduct by the district attorney, depriving the defendant of a fair trial, where it appears that he was unfamiliar with the English language, especially legal phrases, and his examination indicated an intent to evade a direct answer.

APPEAL from a judgment of the Superior Court of Riverside County and from an order refusing a new trial. F. E. Densmore, Judge.

The facts are stated in the opinion of the court.

A. Heber Winder, and Richard L. North, for Appellant.

U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for Respondent.

THE COURT.—The defendant was charged with the murder of one Harriet Guyot, in Riverside County, convicted of murder in the first degree and sentenced to death. He appeals from the judgment and an order denying his motion for a new trial.

As grounds for a reversal it is claimed by appellant that the evidence is not sufficient to sustain the verdict, and that

he was precluded from having a fair and impartial trial through prejudicial misconduct on the part of the district attorney.

The evidence in the case shows that the defendant, a native of Belgium, came to the United States a few years ago and toward the end of the year 1911 located in Portland, Oregon. He worked in different capacities in Portland, and during his stay there stopped at a lodging-house kept by one Andre Guyot, son of the woman he was convicted of having murdered. All of these parties became quite friendly. About January 1, 1912, the defendant, who claimed to have some knowledge of prospecting and attracted by reports of gold discoveries in Imperial County, this state, induced the deceased, Mrs. Guyot, to furnish the money for a prospecting tour in that locality. The deceased, a woman aged about fifty-nine years, agreed to go with the defendant, and at her request a friend of hers, a Miss Julia Francois of The Dalles, Oregon, was to accompany them under an arrangement that all should share equally in whatever successes the enterprise attained. All of the parties were natives of Belgium, though unrelated to each other. The defendant was about thirty-seven years of age, and Miss Francois about nineteen years of age. Mrs. Guyot furnished five hundred and fifty dollars for the necessary expenses of the enterprise, which was about the only money the party had. This she turned over to the defendant who acted as treasurer of the expedition, paying all the bills, purchasing all the supplies and retaining control and possession of the money. The party left Portland in January, 1912, and in due time arrived in Brawley in Imperial County. On investigation it was ascertained that the reports of discovery of gold mines there were without merit and after some further investigation it was determined that the party should go up into the Chuckawalla Mountains in the eastern part of Riverside County, where some prospecting had been done and some mining locations made. Proceeding by train part of the way and the rest by wagon the party made their permanent camp about three and one-half miles from Chuckawalla Springs, which point they reached about February 1, 1912. The locality where their camp was made was a remote, lonesome spot, the surrounding country for miles in every direction being a desolate waste of mountains and desert, visited

only by occasional prospectors. The three members of the party occupied a single tent, the women sleeping together in the rear while the defendant occupied a bed at the entrance of the tent. They prospected for gold in the nearby cañons for about six weeks, but without success, and their supply of money had diminished to about \$117. About the first day of March, 1912, one M. D. C. Putman, an American, came into the hills, making his camp about two miles from the camp of the defendant. Putman was a prospector and had theretofore located mining claims near where he camped and had come up for the purpose of looking after them. He met the defendant and the women at their camp a day or so after he arrived. All along after the party had left Portland defendant, when occasion called for it, represented the elder woman as his mother and the younger as his wife, himself going under the name of Frank Guyot, and so stated such relationship to Putman. No particular importance, however, is to be attached to these representations, they being doubtless made, as stated by defendant, to avoid possible comment and talk while the party was together. On Friday, March 15, 1912, the defendant accompanied by the younger woman came to Putman's camp and Putman asked the defendant if he could let him have some salt of which he was in need. Defendant promised to let him have it and on the following Sunday, March 17th, about nine o'clock, Putman went over to the camp of defendant and got it. When within a short distance of the camp he perceived the defendant moving rapidly backward and forward carrying sand in a bucket and scattering it near the tent. When defendant discovered Putman approaching he called to him to wait and he would bring him the salt, which he did. He appeared nervous and excited. After handing him the salt defendant stated he would go to Putman's camp with him and they both started in that direction. As they proceeded Putman asked defendant how his wife and mother were and defendant told him that they were down at the dry washer which the defendant had set up about a mile below his camp. This statement surprised Putman as he had passed the dry washer on his way to defendant's camp and assuming that he might be in that vicinity had called and had got no answer from any one. He further stated that his wife and mother were going over to Chuckawalla Springs the

next morning and there catch a wagon that would take them to the railroad, as his mother was to meet a government engineer in Yuma. Putman testified that his suspicions were aroused from the peculiar action and conduct of the defendant. He had no weapon in his camp of any character and he knew that defendant was armed. About noon of that day—Sunday—Putman left his camp and took his station on a high hill some distance from the camp of the defendant and where he could look down upon it. He remained at this point until about five o'clock in the afternoon observing the actions of the defendant. When he first reached his point of observation defendant was engaged with a pick and shovel caving down a bank some twenty-five feet high a short distance from the tent. After he accomplished this the defendant then engaged in burning up rags and papers which he brought from the tent at a small furnace located near it. While so occupied he walked around the tent looking up and down the wash. When Putman left the hill to return to his own camp defendant was seated near his tent. At no time during the afternoon did Putman see either of the women about the place. Early the next morning, satisfied that there was something wrong, Putman walked about twelve miles to a camp where two men were working, told them of his suspicions and tried to get them to come back with him and investigate the disappearance of the two women. They could not do so as they expected visitors that day to their camp, but they loaned Putman a rifle and cartridges. Putman returned to his camp that night and the next morning—Tuesday—started for the camp of the defendant. On the way he stopped at Chuckawalla Springs where he met two men—Heyman and McCarty—with the former of whom he was acquainted. Putman told them of the apparent disappearance of the women and his suspicions and the three proceeded to the defendant's camp, which they found deserted. With a pick and shovel found in the tent, Putman and Heyman dug into the gravel that had been caved down from the bank and when they had dug about ten inches struck a blanket, which they ripped open with a pen knife and found that it enveloped a human body. No further investigation was made and the grave was covered up. It was then agreed that Heyman, who had seen the defendant the day before, should go to the railroad station and telegraph

the defendant's description in order to secure his arrest. Putman after investigating for that purpose found in one of the dry washers the tracks of the defendant leading toward Putman's camp. He followed it that far and found on the table in his tent a note from defendant which the latter had left there Tuesday morning. Subsequently a note was also found in defendant's tent which had been left there by him for Putman. In these notes defendant stated that his wife and mother had left the camp on the Sunday Putman was over there, but that he was too sick to go with them; that he had been over to Chuckawalla Springs the day before (Monday); that he had found no trace of a wagon there and that he thought the women had followed the wagon trail of Putman (the latter had come out in a wagon on a return trip from Brawley with provisions a few days before) or the Palo Verde trail; that he was going to find out which trail they had taken and if he did not return in five or six days to take such provisions from his tent as he could use. Putman took up the trail of the defendant from where it left his camp and followed it on foot for about thirty miles toward Imperial Junction to which defendant also on foot was evidently proceeding. Night overtook Putman near Iris, a telegraph station about ten miles east of Imperial Junction. He proceeded to Iris and had the operator there telegraph to Imperial Junction to arrest the defendant for killing his mother and wife. In pursuance of the dispatch the defendant was apprehended on the train as he was about to take it at that place, and Putman that night took the train to Imperial Junction. When arrested the defendant stated that he was on the way to Yuma to employ men to work his mines. After being informed that he had been arrested at the instigation of Putman and when the latter came into his presence at Imperial Junction that night, he accused Putman of having killed the women and compelling him to bury their bodies. After the arrest of the defendant he made a plat for the officers showing about where the bodies of the women had been buried and where other things had been hidden by him, and the coroner and sheriff, accompanied by Putman and others went over to the camp of the defendant where they exhumed the bodies of both Mrs. Guyot and Miss Francois. The body of Mrs. Guyot was found buried under a bank about one hundred feet from the tent

at the spot where Putman, Heyman, and McCarty had discovered it Tuesday morning. The body of Miss Francois was found buried at another spot about thirty feet from the tent. Both bodies were attired in night gowns. A shawl strap had been buckled and some cording wrapped about the remains of Mrs. Guyot and her body was entirely enveloped in a blanket which was held closely in place by hammock cords tied about it. She had been killed by a pistol bullet fired into the base of her brain. Immediately above the spot where the body of Miss Francois was buried a large quantity of ashes were found, the remains evidently of quite a large fire. Her body was also wrapped in a blanket and in addition a mattress was wrapped around it tightly corded. She had been shot through the right arm and through the head. There was also found buried near the tent two suit cases containing women's clothes, and some women's clothing and a man's overcoat were also found buried. All the bedding used by the women had been buried with their bodies, and in and about the tent were no articles of clothing or effects to indicate that any women had ever occupied it, and fresh sand and gravel had been strewn about the floor inside the tent. It appears further that the defendant on Monday morning, March 18th, went to Chuckawalla Springs, where persons going and coming through the country necessarily stopped for water. He met the witness Heyman there who with the witness McCarty had reached the wells the day previously about one o'clock in the afternoon and were camped there. McCarty was away when the defendant came. Defendant asked Heyman if there had been a light wagon there drawn by two horses and was told that there had not. Defendant then said that his wife had told him at one o'clock Sunday that the wagon had come and that "they had got ready right away and left." Heyman and defendant looked around for possible tracks of a wagon but found none. Heyman told the defendant that if he believed the women had become lost he would aid him in trying to find them, but defendant said they had probably taken another trail and let the matter rest at that. He remained about an hour and started back to his camp. There were other circumstances of minor importance tending to show the defendant's guilt which we do not think it necessary to mention.

The facts related in the foregoing statement constitute legal evidence of the defendant's guilt sufficient to justify the verdict. The testimony of the defendant, and his claim prior to the trial, to the effect that Putman was the guilty person is not entirely credible, in itself, and it is in many respects inconsistent with the facts established by the testimony of other witnesses at the trial. The question of Putman's credibility and veracity was for the determination of the jury. They believed Putman, as they had a right to do. The attempt to impeach Putman's reputation for truth resulted in disclosing that, after the homicide and after the defendant's statement that Putman had committed the murder had got abroad in the village of Brawley, the tongues of a few gossips became busy and made a reputation for Putman which he did not have before. The attempt was met by that of a number of witnesses who had known him for many years to the effect that he was a man of good repute and character. The proof does not show any adequate motive for the crime. The absence of motive is a fact favorable to one accused of crime, and is to be considered in weighing the evidence against him. But, of itself, it does not, as matter of law, establish innocence or necessarily raise a reasonable doubt of guilt. Its effect is a question for the jury to decide. We find no reasonable ground for the claim that the evidence does not sustain the verdict.

During the cross-examination of the defendant the district attorney asked this question: "I ask you if you were not in the first tribunal court of Brussels, Kingdom of Belgium, on or about the 26th of February, 1904, convicted of a felony, embezzlement?" He answered: "No, sir." Afterward he was recalled by his counsel for further examination and thereupon the district attorney made a further cross-examination. At the close of this cross-examination he asked leave to renew the above inquiry as to a former conviction, saying that he did not think the witness had understood the question. Leave being given, the defendant was then asked: "Do you know what a felony is?" He answered, "No, sir." The court then, at the district attorney's request, explained to the defendant the meaning of the word "felony." Thereupon the following examination took place:

"Q. Were you not, in Brussels, Belgium, just a year or so before you came to Canada, convicted of a felony?"

"A. No, sir; I never noticed it.

"Q. Were you ever convicted in the criminal court of Brussels, Belgium, sentenced to punishment in the state prison for five years?

"A. No, sir; by golly, no. I stand right up upon that. Five years? No, sir.

"Q. Were you not in the criminal courts of Belgium convicted of a felony and sentenced to the state prison?

"A. No, sir. No.

"Q. You were not?

"A. I know nothing about that."

The district attorney had received from the commissioner of police in Brussels a letter, the date of which does not appear, stating in substance that the defendant had there been convicted of a felony. The information was filed on March 29, 1912, and the trial was begun on May 21, 1912. No record of the conviction of such felony was introduced or offered in evidence. It is not claimed that there was time within which to obtain such record after the receipt of the letter.

Where the defendant offers himself as a witness he may be asked, for the purposes of impeachment, if he has not been convicted of a felony. (Code Civ. Proc., sec. 2051; *People v. Johnson*, 57 Cal. 573; *People v. Crowley*, 100 Cal. 482, [35 Pac. 84]; *People v. Sears*, 119 Cal. 271, [51 Pac. 325].) The defendant's counsel concede this, but they argue that the repetitions of the question in different forms, after the negative answer had been given to the first question, would naturally lead the jury to infer that the district attorney had in his possession some authentic information to the effect that the defendant had been so convicted, and that therefore, such repetition constituted misconduct prejudicial to the defendant, depriving him of a fair trial. They do not assert that the district attorney intended to produce this belief by the jury, but they claim that it is prejudicial misconduct of itself regardless of his motive or purpose. The previous examination of the witness, his unfamiliarity with the English language, and the form of the answers to the questions as above given, sufficiently exonerate the district attorney from any charge of an improper purpose. There was no impropriety in the repetition of the question, under the circumstances existing. The defendant, while able to speak fluently, was evidently un-

familiar with English, especially the legal phrases used in a court room. The answers furnish some indication of an intent by him to evade a direct answer. The cases from this state, cited by counsel in support of this point, involved questions put by the district attorney tending to elicit incompetent or irrelevant evidence of a character injurious to the defendant. Whether the repetition of a proper question may constitute misconduct in any circumstances, sufficient to call for a reversal, we need not determine. We are satisfied that under the circumstances shown in this case no cause for reversal upon that ground exists.

The claim that the district attorney was guilty of misconduct in exhibiting to the jury, while he was asked the foregoing questions, the letter from the commissioner of police of Brussels, above mentioned, is not sustained by the record. The letter was written in the French language and it does not appear that it would have conveyed any information to any juror had he seen it. The evidence taken on the hearing of the motion for a new trial on this subject, shows that the district attorney did not mention the letter, or show it to the jury, or have it in his hands while asking these questions. In the examination no reference was made to such letter. The affidavits of the jurors state that they knew nothing about the letter and that it was not referred to during their deliberations. There is also a claim that the district attorney was guilty of misconduct in exhibiting the same letter to a newspaper reporter immediately after the jury was charged and while they were filing out of the court room, this being done in close proximity to their line of march. The affidavits of the jurors above referred to show that this exhibition, if it was known to them at all, produced no effect upon them. Counsels' surmise that it may have done so is not worthy of consideration. These are all the points made in support of the appeal. An examination of the record discloses no other objections worthy of mention.

The judgment and order are affirmed.

Beatty, C. J., does not participate in the foregoing.

[L. A. No. 2980. Department Two.—February 18, 1913.]

**MARY E. CAKE, Appellant, v. CITY OF LOS ANGELES,
Respondent.**

STATUTES—CONSTRUCTION OF WORD “SHALL”—WHEN GIVEN MANDATORY EFFECT.—It is a general rule of construction that the word “shall” when found in a statute is not to be construed to be mandatory, unless the intent of the legislature that it shall be so construed is unequivocally evidenced. This evidence, found in the statute itself, may consist of a declaration that the word is of mandatory import, or of negative words forbidding the doing of the act after the time fixed, or of words withdrawing the power to do the act after the time fixed, or by a showing that a right dependent upon the doing of the act within the time fixed is lost or impaired by the non-performance of that act.

STREET OPENING ACT—TIME LIMITED FOR PREPARING ASSESSMENT—PROVISION MERELY DIRECTORY.—The provisions of sections 16 and 19 of the Street Opening Act of 1903, as amended in 1909 (Stats. 1909, p. 1040), fixing a time limit for the preparation of either the original assessment or a new assessment for the expenses of the proposed improvement, are merely directory.

ID.—NEW ASSESSMENT—FAILURE TO PREPARE WITHIN SIXTY DAYS FROM ORDER OF CITY COUNCIL.—The failure to prepare the new assessment within sixty days from the date of the order of the city council directing it, there having been no extension of time given for that purpose, does not render the assessment void.

ID.—NEW ASSESSMENT MADE ACCORDING TO INSTRUCTIONS OF CITY COUNCIL—INSTRUCTIONS GIVEN AFTER SUSTAINING PROTEST TO ORIGINAL ASSESSMENT.—The fact that the new assessment was not made in accordance with the free and uninfluenced judgment of the street superintendent, in this case the board of public works of the municipality, but was made solely in accordance with a memorandum of instructions furnished by the city council, does not invalidate the assessment. The fact that such instructions were given by the council after it had sustained the protests to the original assessment and after it had ordered the new, is immaterial.

ID.—EQUITABLENESS OF ASSESSMENT—DETERMINATION OF COUNCIL—ABSENCE OF FRAUD.—Under that act, a person assessed has the right to be heard by the city council upon the matter of the equitable ness of the assessment, and in the absence of fraud in connection with the assessment, the determination of the council is final.

ID.—PENALTY FOR DELINQUENCY COMPUTED ON ENTIRE ASSESSMENT—DAMAGES AWARDED NOT TO BE DEDUCTED.—Under sections 21, 22

and 24 of that act, a property owner who had been awarded damages for lands condemned for the proposed improvement, and whose remaining lands were assessed therefor, and who allows the assessment to become delinquent, is liable for a five per cent penalty computed upon the entire amount of the assessment, without deduction for the amount awarded as damages.

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

Hester, Merrill & Craig, for Appellant.

John W. Shenk, City Attorney, and E. R. Young, Assistant City Attorney, for Respondent.

HENSHAW, J.—After general demurrer sustained to her complaint, judgment was entered for defendant and plaintiff appeals upon the judgment-roll. By her complaint she seeks to recover from the city of Los Angeles moneys paid by her under a street assessment, which moneys she alleges were paid by compulsion and under protest. The complaint charges in two counts. In the first, allegations are set forth upon which it is contended the assessment was void. By the second, the illegality of the assessment is not asserted, but it is alleged that plaintiff was compelled to pay a sum greater than that for which she was legally liable.

The facts disclosed by the complaint are the following: The city of Los Angeles, defendant herein, under the Street Opening Act of 1903 [Stats. 1903, p. 376], undertook to widen one of its streets named Hill Street. A portion of one of plaintiff's lots lay within the proposed street as widened, and under condemnation proceedings plaintiff was awarded \$8,475.81 for this land. The street work was done and an assessment upon the land within the district was made and returned by the board of public works. Objections were filed to the assessment and on May 24, 1910, the committee on streets and boulevards of the city council of the city of Los Angeles recommended that the assessment "be referred back to the board of public works for modification." This recommendation was adopted by the council. The objections to the

assessment were then sustained and the assessment referred to the board of public works. On August 23, 1910, the council by resolution instructed the board of public works to make the new or modified assessment in accordance with a memorandum prepared by its committee on streets and boulevards. In pursuance of such resolution the board of public works, on August 25, 1910, filed with the city clerk of the defendant a new assessment. This new assessment was made in strict conformity with instructions of the city council, and, it is alleged, not in accordance with the free and uninfluenced judgment of the board of public works. Plaintiff was assessed upon three parcels of land, the assessment upon the first being \$8,810.40, the second \$4,360.35 and the third \$4 38.35. It is alleged that the first two items of assessment were disproportionate to and in excess of the benefits that would be derived from the improvement, and were likewise disproportionate to and in excess of the assessments upon other properties within the assessment district which were of greater value and would receive larger benefits from the improvement. Upon the filing of the new assessment, notice thereof and of the time for filing objections thereto was given in accordance with the requirement of section 18 of the Street Opening Act. Pursuant to notice, objections to the assessments were filed by certain owners of the land, of whom plaintiff was one. The objections were overruled and the new assessment was confirmed. Afterward and in accordance with the provisions of the Street Opening Act, the board of public works fixed the sixteenth day of December, 1910, as the time when all unpaid assessments should be and become delinquent and fixed the thirteenth day of January, 1911, as the time when lands subject to the lien of the delinquent assessment should be sold. Under the conviction that the assessment was void, plaintiff did not pay the amounts assessed against her lands before the date of delinquency. On January 5, 1911, she commenced proceedings in the superior court to have the proposed sale of her lots enjoined, upon the ground that the assessment was void, and on the ninth day of January moved the court for an order restraining the sale until her action could be heard upon its merits. This motion was on the ninth day of January denied by the court, and the board of public works declared that it would sell plaintiff's property upon the date fixed for sale

unless plaintiff would execute to the board a receipt for the sum of \$8,475.81 awarded to her as the value of her property taken for the purposes of the improvement, and additionally should pay the sum of \$5,824.64. This latter sum was made up of three separate items. First, the sum of \$5,142.24, the difference between the total assessment of \$13,618.10 and the \$8,475.81 award in the condemnation proceedings; second, \$1.50, the cost of advertising the sale, and, third, \$680.90, the amount of the five per cent penalty provided by law estimated upon the total sum of \$13,618.10. To protect her property from this forced sale, after protest and under compulsion, plaintiff gave the receipt and paid the full amount demanded. Thereafter and before the commencement of the action plaintiff filed her claim against the defendant in the manner provided therefor by the charter of the defendant, and upon the refusal to allow or pay her claim commenced this action.

1. Under her first count, charging upon the invalidity of the assessment, appellant contends that the new or second assessment was not returned within the time limited by the law. The proceedings upon an original assessment are prescribed by section 16 of the act as amended in 1909. (Stats. 1909, p. 1040.) There it is declared that:

“The street superintendent, upon receiving the said diagram, shall proceed to assess the total expenses of the proposed improvement upon and against the lands . . . within said assessment district . . . in proportion to the benefits to be derived from said improvement. The street superintendent shall complete said assessment within sixty days after the receipt by him of said diagram; provided, however, that the city council may by order extend the time for the completion of said assessment for a period not exceeding ninety days additional.”

Section 19 of the same act further provides:

“And said council shall hear all such objections at said meeting or at any other time to which the hearing thereof may be adjourned, and pass upon such assessment, and may confirm, modify or correct said assessment, or may order a new assessment, upon which like proceedings shall be had as in the case of an original assessment; or if there be no objections the council shall, at any regular meeting after the expiration of the time for filing objections, confirm such assessment and

the action of the council upon such objections and the assessment shall be final and conclusive in the premises."

It is conceded that the action of the city council upon the protests raised against the original assessment amounted to an order upon the board of public works to prepare a new assessment. Appellant points out that the original assessment is to be completed within sixty days after the receipt by the street superintendent (here, board of public works) of the diagram, or within such extended period not exceeding ninety days additional time, as the council may award. Further, appellant points out that when a new assessment is ordered it is declared that upon this "like proceedings shall be had as in the case of an original assessment." Appellant construes this language to limit the time within which the new assessment must be prepared, and as the new assessment was not prepared within sixty days from the date of the order of the council upon the board of public works so to prepare it, and as no extension of time was given by the board of public works for this purpose, the conclusion, appellant argues, is irresistible that the assessment is void. The conclusion, however, does not necessarily follow. It is at least a reasonable construction of the declaration that "like proceedings shall be had as in the case of an original assessment," to say that it has reference to the new assessment when completed, and that "like proceedings" therefore mean the proceedings that are or may be taken after the return of the new assessment to the council, the appeal, notice of the hearing of the appeal, the determination thereof and the like. But aside from this, and in full recognition of the fact that the proceedings for the improvement of streets are proceedings *in invitum*, we are of the opinion that even if it be held that the time limit is applicable to the new assessment, still the language fixing this time limit is directory and not mandatory. It is a general rule of construction that the word "shall" when found in a statute is not to be construed to be mandatory, unless the intent of the legislature that it shall be so construed is unequivocally evidenced. This evidence, found in the statute itself, may be of different kinds. It may be found in a declaration that the word is of mandatory import, as we find in our own constitution, that its declarations are all mandatory and prohibitory unless the contrary is expressly declared. (Const.,

art. I, sec. 22.) It may be evidenced by negative words forbidding the doing of the act after the time fixed. Or it may be evidenced by words withdrawing the power to do the act after the time fixed. Or, finally, it may be evidenced by a showing that a right dependent upon the doing of the act within the time fixed is lost or impaired by the nonperformance of that act. (*Wheeler v. Chicago*, 24 Ill. 105, [76 Am. Dec. 736]; *Pond v. Negus*, 3 Mass. 232, [3 Am. Dec. 131]; *In the Matter of Broadway Widening*, 63 Barb. (N. Y.) 579; *Fay v. Wood*, 65 Mich. 390, [32 N. W. 614].) A reading of the statute here under consideration discloses that there are no negative words denying the power to return the new assessment after the indicated time; that no undue advantage is gained to the city or to the contractor, and no benefit either to the public or to any individual thereof is impaired or lost by the return of the assessment after the indicated time, and, under these circumstances, in accordance with the rules of construction above announced, it is held that the provision is directory.

Plaintiff's next objection to the validity of the assessment rests upon the allegation of her complaint that it was not made in accordance with the free and uninfluenced judgment of the board of works, but was made solely under the memorandum of instructions furnished to the board by the city council. If this were true, it would be no ground for overthrowing the assessment. The city council sits as a *quasi* court of appeal to pass upon the complaints and objections which the interested parties, contractors, or property owners, may make to the assessment. Having found that certain objections are well taken, and, on account of them, having ordered the board of works to prepare a new assessment, it is not only unobjectionable but quite commendable for the council, in so ordering the new assessment, to direct the form which it shall take. It is precisely what a court of appeals is called upon to do in many of the matters which come before it. Thus a court of appeals is enjoined by the laws of this state, in the event that an appeal is deemed well taken and a new trial ordered, to discuss all objections presented upon the appeal and that may arise in the course of a new trial, to the end that the inferior tribunal may avoid the repetition of error. It does not appear that the city council did more than this in the

present instance, and the property owner still had his right of objection and protest to the new assessment when returned to the council.

Appellant's third objection is to the effect that even if the council had authority to instruct the board upon the manner of making the assessment, it lost jurisdiction in the matter upon May 24th; that is to say, that its authority was lost when it made its order sustaining the objections and ordering the new assessment. We see no force to this objection. The council had heard the objections of the property owners, weighed them and passed upon them. Nothing in the statute forbids, and no right of a property owner is impaired by the giving of information or instruction upon the subject of the new assessment to the board of public works at any time after the date of sustaining the protest to the original assessment.

Plaintiff's allegation that the assessments upon her two lots were inequitable was a matter upon which she had the right to be heard and was heard before the council. She makes no charge of fraud in connection with the assessment of her property, and, without such a charge, the determination of the council is final. (*Duncan v. Ramish*, 142 Cal. 686, [76 Pac. 661]; *Los Angeles etc. Co. v. County of Los Angeles*, 162 Cal. 164, [121 Pac. 384].)

2. The second count is based entirely upon the following facts: Plaintiff having allowed her assessment to become delinquent became liable for the five per cent penalty, with costs, provided by the law. (Street Opening Act, sec. 22.) Plaintiff concedes that she thus became liable for this penalty, but insists that the penalty should be imposed upon the net amount due from her to the city; or, in other words, that it should not be estimated upon the sum of \$13,618.10, but should be estimated upon the difference between that sum and the amount of the award in her favor in the condemnation proceeding. But the answer to this is that whatever be thought to be plaintiff's equity in this regard, the whole matter is under statutory control, and a reading of the statute discloses that it contemplates that the five per cent delinquency shall be estimated upon the total of the assessment. A reading of sections 22 and 24 of the act discloses that the penalty attaches immediately upon the failure of the property owner to pay within the time limited, and that this penalty, since it thus

attaches, is to be estimated upon the total amount of the assessment. The only provision for an offset is found in section 21, which provides that the property owner may demand of the street superintendent that there be offset against the assessment the amount to which he is entitled under any award for his property taken, and the section then proceeds: "Thereupon, if said amount is equal to or greater than such assessments, *including any penalties and costs due thereon*, the assessments shall be marked 'paid by offset'; and if the said amount is less than the assessments, and any penalties and costs due thereon the person demanding such offset shall at the same time pay the difference to the street superintendent in money and the assessment shall on such payment, be marked paid, the entry showing what part thereof is paid by offset and what part in money." It is thus made doubly plain that the five per cent penalty was to be imposed upon the total amount of the assessment.

For these reasons the judgment appealed from is affirmed.

Lorigan, J., and Melvin, J., concurred.

[S. F. No. 6093. Department One.—February 19, 1913.]

LAURA A. ANDERSON, Appellant, v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Respondent.

LIFE INSURANCE—DATE OF ISSUANCE OF POLICY—EXEMPTION FROM LIABILITY FOR SUICIDE WITHIN ONE YEAR.—A condition in a policy of life insurance, providing that the insurance company shall not be liable in the event of the insured's death by his own act during the period of one year after the "issuance of this policy," does not exempt the company for a death by suicide occurring less than one year after the day when the policy was in fact signed by the officers of the company, but more than one year after the day designated in the policy as its date, where it appears from other provisions of the policy, read in connection with the application for insurance which was made a part of the contract, that the latter date was intended to be and was adopted by both parties as the day when the risk attached.

ID.—CONSTRUCTION OF WRITING—USUAL MEANING OF WORD MAY BE DISREGARDED.—In construing any writing, the usual definition of a single word is not a conclusive test of the meaning to be attributed to it in the connection in which it is found. The sense in which the parties employed the particular word or phrase in question must be ascertained from an examination of the entire instrument, read in the light of the circumstances surrounding its execution.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Bert Schlesinger, and Guy R. Kennedy, for Appellant.

Chickering & Gregory, for Respondent.

SLOSS, J.—This is an action based upon a policy of life insurance, insuring the life of Philip M. Anderson, in favor of the plaintiff, his wife, in the sum of two thousand dollars. Judgment went in favor of the defendant, and the plaintiff appeals therefrom and from an order denying her motion for a new trial.

The material facts are undisputed. The issuance of the policy, the payment of premiums, the death of the insured, the due presentation of proofs, and nonpayment are all conceded. The defense was that the insured died by his own hand, and that thereby the policy was avoided.

On May 21, 1908, Philip M. Anderson made a written application to defendant for insurance. The application, as the court finds, was returned by the company to the applicant for amendment, and on the twenty-fourth day of June, 1908, Anderson signed a second application. A medical examiner's report, dated May 22, 1908, was attached to the first application. No such report was attached to the second.

On July 6, 1908, the defendant "caused to be executed and issued" the policy sued upon. It bore date the twenty-second day of May, 1908, and referred to the first application, a copy of which was annexed. The policy recited that it was issued in consideration of a premium of \$44.50, receipt whereof was acknowledged, and the payment of a like sum upon the twenty-second day of May in succeeding years.

Each of the applications contained the following statements:

"During the period of one year following the date of issue of the policy of insurance for which application is hereby made, I will not engage in any of the following extra-hazardous occupations or employments: retailing intoxicating liquors, handling electric wires and dynamos . . . , unless written permission is expressly granted by the company.

"I also state that I will not die by my own act, whether sane or insane, during the period of one year next following said date of issue."

Among the conditions of the policy itself were these:

"Occupation. This policy is free from any restriction as to military or naval service, and, as to other occupations of the insured, it is free from any restriction after one year from its date as set forth in the provisions of the application indorsed hereon or attached hereto.

"Suicide. The company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the issuance of this policy, as set forth in the provisions of the application indorsed hereon or attached hereto."

On or about May 21, 1909, Anderson paid the defendant the second premium upon said policy. On June 12, 1909, he committed suicide. His death, consequently, occurred less than one year after the day when the policy was in fact signed by the officers of the company, but more than one year after the day designated in the policy as its date.

On these facts, the single question is whether the insured violated the condition of the policy regarding suicide. More specifically, the issue is defined, with sufficient accuracy, in the following language, taken from respondent's brief: "If the date of the policy determines its issuance, the insured did not commit suicide within one year following the issuance of the policy, and the defendant is liable. If the issuance is a physical fact of execution, independent of the date of the policy, the insured committed suicide within one year after the issuance of the policy, and the defendant is not liable." The court below adopted the latter view.

The contention of the appellant is that the twenty-second day of May, 1908, was "adopted by both parties" as the day of issuance of the policy, and that the year, within which

Anderson's death by his own act would avoid the policy, commenced to run on that day. We think this position is correct.

It must, of course, be admitted, in accordance with the respondent's claims, that the expressions "date of this policy," and "issuance of this policy" are not, according to the ordinary acceptance of the terms, synonymous. The word "issuance," as applied to a contract like a policy of insurance, would, if standing alone, probably be taken to mean, either the signing (without delivery) of the contract by the authorized officers of the insuring company (*Kansas Mut. L. Ins. Co. v. Coalson*, 22 Tex. Civ. App. 64, [54 S. W. 388]; *Stringham v. Mutual Life Ins. Co.*, 44 Or. 447, [75 Pac. 822]; or, perhaps, the act of delivery of a fully written and signed policy (*Logsdon v. Supreme Lodge*, 34 Wash. 666, [76 Pac. 292]; *Homestead F. Ins. Co. v. Ison*, 110 Va. 18, [65 S. E. 463]; *Lick v. Cit. Ins. Co.*, 16 Ind. App. 565, [45 N. E. 804]). But in construing any writing, the usual definition of a single word is not a conclusive test of the meaning to be attributed to it in the connection in which it is found. We must endeavor to ascertain, from an examination of the entire instrument, read in the light of the circumstances surrounding its execution, the sense which the parties employed the particular phrase in question.

Here we find that the policy incorporates, as a part of the contract, the application of May 22d. Unquestionably the words "issuance of this policy," in the policy itself, were intended to mean the same thing as "date of issue" in the application. The insurer, acting, so far as the record shows, with full knowledge of all the facts, elected to base its policy upon the first application, to date its policy May 22, 1908, the day upon which the medical examination of Anderson had taken place, to make the premiums payable on the twenty-second day of May of successive years, to make the principal sum payable in the event of death within twenty years from the apparent date of the policy, and to make dividends payable on the twenty-second day of May of each year. In all these particulars, the company expressed its intention to fix the rights of the parties with reference to the twenty-second day of May in just the same way that these rights would have been fixed if a policy had been actually signed and delivered on that day. It is perfectly competent for the parties to

agree that a policy shall be antedated and, when this is done, the policy takes effect by relation from the date agreed upon. (1 Cooley's Brief on Insurance, 831, 844; *City of Davenport v. Peoria M. & F. I. Co.*, 17 Iowa, 276; *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18; *Philadelphia Life Ins. Co. v. American L. & H. Ins. Co.*, 23 Pa. St. 65.) In the absence of evidence to the contrary, a policy will be presumed to take effect upon its date. (1 Cooley on Insurance, 844; *Union Ins. Co. v. American F. Ins. Co.*, 107 Cal. 328, [48 Am. St. Rep. 140, 28 L. R. A. 692, 40 Pac. 431].) "And, after it has been issued and delivered, it takes effect from the date stated by its terms, and not from the date of delivery." (*Id.*; *Gordon v. United States Gas Co.*, (Tenn.) 54 S. W. 98.)

The policy here sued upon, therefore, must be construed as effecting an insurance upon the life of Anderson for a period beginning May 22, 1908. The day upon which, by the agreement of the parties, the risk attached, may reasonably be taken to be the day which was meant to be designated, in the clause under consideration, as that of the "issuance" of the policy. The company inserted in the policy the various provisions above referred to, securing to itself various benefits which would naturally pertain to an insurance issued on the twenty-second day of May, rather than one issued at a later time. It thus became entitled to an earlier payment of premiums; it also received payment for insuring the life of Anderson during a period which had already elapsed when the policy was actually signed and delivered. The policy, then, having been written so as to take effect for its main purpose and its principal incidents, as of the twenty-second day of May, a clause which speaks of the time of "issuance" of the policy is fairly to be taken to refer to that date.

The clause in question has been given the construction just indicated in the case of *Harrington v. Mutual L. Ins. Co.*, 21 N. D. 447, [34 L. R. A. (N. S.) 373, 131 N. W. 246], decided by the supreme court of North Dakota since the rendition of the judgment here under review. In holding that the period during which suicide would avoid the policy began at the date of the policy, the court used this language: "The company took premiums for that period, fixed the date of the payment of the premiums as of that date, and made no provision in the contract limiting the dating back solely to the payment

of the premiums. It is well settled that where there is any uncertainty in the terms of an insurance policy the policy will be construed most favorably for the insured, as the language used in the policy is the language of the insuring company."

But, beyond these considerations, there is a further ground upon which the plaintiff's right to recover should be sustained.

The clause in the application relative to suicide speaks of a period of one year "next following said date of issue." The expression "said date of issue" must obviously be referred back to some prior clause in which the term "date of issue" is employed. Such prior clause is the one limiting the right of the insured to engage in certain extra-hazardous occupations. In it the application states that "during the period of one year following the date of issuance of the policy . . . I will not engage in any of the following . . . occupations." Clearly the date marking the beginning of the period must be the same in each case. Coming to the policy itself, we find corresponding provisions covering the two subjects of occupation and suicide. The clause of the policy entitled "occupation" states that as to occupations other than military or naval service, the policy is free from any restriction "after one year from its date as set forth in the provisions of the application indorsed hereon or attached hereto." Here the period during which the insured's choice of occupations is to be limited is plainly declared to commence at the date of the policy, and the concluding words ("as set forth in the provisions of the application") afford a clear indication that the period so designated was understood by the framer of the policy (i. e., the defendant) to mean the same period as that described in the application. The clause covering suicide varies the language to "one year after the issuance of this policy," and continues with the same reference "as set forth in the provisions of the application . . ." Apparently, then, there was no intent in either case to make a provision which should differ from that indicated by the terms of the application. With reference to occupations, the company, in its policy, gave its own interpretation to the phrase "one year following the date of issue," appearing in both clauses of the application, and we see no good reason for believing that any other interpretation was intended to apply to the suicide provision, regarding which the application followed, in terms, the language

used in restricting occupations. Reading the various clauses of the policy with those of the application as parts of one contract, it seems clear that the three expressions "date of issue," "date of this policy" and "issuance of this policy," were used interchangeably to express a single point of time. If this be so, no further argument is needed to establish the conclusion that, under the settled rule that policies of insurance are to be construed against the insurer, the point of time beginning the restricted period of one year must be taken to be the date appearing upon the face of the policy.

It follows that, the defendant having failed to establish the only defense relied upon, the plaintiff was, upon the facts found, entitled to recover.

The judgment and the order appealed from are reversed with directions to the court below to alter its conclusions of law in accordance with the views here expressed, and thereupon to enter judgment in favor of the plaintiff for the amount of the policy, with interest at the legal rate from the time when the loss was payable, together with costs.

Shaw, J., and Angellotti, J., concurred.

[L. A. No. 2805. In Bank.—February 19, 1913.]

F. NAKAGAWA, Respondent, v. M. OKAMOTO, Appellant.

M. YAMAGUCHIE, Respondent, v. F. A. KASUYAMA,
Appellant.

K. AKUTAGAWA, Respondent, v. U. ABE, Appellant.

K. AKUTAGAWA, Respondent, v. M. MATSUNO, Ap-
pellant..

CONTRACT—PENALTY—CONSTRUCTION.—In determining whether a provision in a contract is for liquidated damage or for a penalty, the fundamental rule is that the construction of such stipulations depends, in each case, upon the intent of the parties, as evidenced by the entire agreement construed in the light of the circumstances under which it was made.

ID.—PROMISSORY NOTES HELD TO HAVE BEEN INTENDED BY WAY OF PENALTY OR FORFEITURE—PROOF OF ACTUAL DAMAGE ESSENTIAL TO RECOVERY.—Promissory notes held to have been intended by way of penalty or forfeiture, in view of which, in the absence of proof of actual damage, no recovery can be had on the notes.

APPEALS from judgments of the Superior Court of Los Angeles County and from orders refusing a new trial. Leon F. Moss, Judge.

The facts are stated in the opinion of the court.

Ingall W. Bull, for Appellants.

Isidore B. Dockweiler, and Walter R. Leeds, for Respondent.

ANGELLOTTI, J.—The four actions above specified were tried together, all involving the same questions. The defendant in each action appeals from a judgment given in favor of the plaintiff therein and from an order denying his motion for a new trial. The motions for a new trial in the four cases were heard upon a single statement, and the record on the four appeals is contained in one transcript.

The original complaints were in the usual form of a complaint on a promissory note, each alleging substantially that on or about July 22, 1909, the defendant executed and delivered to the "Japanese Farmers' Association" his promissory note in the following words, viz.:

"Los Angeles, Cal., July 22nd, 1909.

"One day after date I promise to pay to the order of Japanese Farmers' Association, five hundred dollars, for value received, with interest at per cent per from until paid, both principal and interest payable only in United States gold coin, and in case suit is instituted to collect this note, or any portion thereof promise to pay such additional sum as the court may adjudge reasonable as attorneys' fees, in said suit.

"\$500.00";

that no part thereof has been paid; and that prior to the commencement of the action the Japanese Farmers' Association duly transferred and sold said note to plaintiff. The answer in each case, among other things, denied the alleged

transfer of the note to the plaintiff therein, and set up as a defense want of consideration. The trial was commenced upon these pleadings.

The evidence developed the fact that the circumstances attendant upon the execution of the notes were substantially as follows: In June, 1909, there were located in the city of Los Angeles two market houses, one known as the Third Street Market and the other as the Ninth Street Market. At that time there was a large number of Japanese farmers engaged in raising garden vegetables to be sold in the markets of said city, many of whom were members of what was called the Japanese Farmers' Association. This body was an unincorporated association, and, so far as the record shows, had no business or purpose defined by any agreement of any kind or character, or any articles of association whatever, was not engaged in business of any kind and had no property. The president testified that he could not explain "what it is." There is absolutely nothing in the record to indicate what were the duties or powers of any of the officers thereof. Prior to June, 1909, most of the Japanese farmers so associated were doing their individual business and selling their produce at the Third Street Market. In that month they agreed among themselves that they would move to the Ninth Street Market, and discontinue doing business at the Third Street Market, and they so did. Some of them purchased stock of the corporation conducting the Ninth Street Market. After this, while these Japanese were so established at the Ninth Street Market for the sale of their produce, some of them owning stock in the corporation conducting the same, a so-called agreement in writing was signed by some eighty of them, including, according to some of the evidence, three of the defendants. It was stipulated that defendant Matsuno never signed this paper and had no knowledge thereof. The so-called agreement, as shown by an alleged reproduction thereof from the memory of the person who prepared it, entered upon the minutes of the Japanese Farmers' Association, was as follows:

"AGREEMENT.

"We, the undersigned, since moved to the Ninth Street new market, we must pray for the success of the said market, and it became necessary to provide for the expansion of the said

market. Therefore, each of us agrees to protect new market, and furthermore, in order to show their good faith, not to be persuaded by the Third Street old market under any inducement, each of us hereby agree to put up five hundred dollars in promissory notes, and at the same time it is agreed that in case of violation of the agreement, the note at once become due; and it is understood and agreed that there would be no objection for the members of the association to attach the property.

“In witness whereof, each of us do hereby sign our names.”

The so-called agreement as entered in the minutes was preceded therein by the following preamble:

July 22nd.

“Since Japanese farmers, Chinese and white farmers moved to the Ninth Street new market the old market is in very lonesome condition. They feel especially in the scarcity of vegetables. They bought up Japanese farmers with money, or bought up farmers by inducing Chinese with money, and attempted to buy with several hundred dollars. We, the Farmers’ Association, tried to prevent it, and also in order to prevent it we provided that each member of the association to give a five hundred dollar note payable one day after date, and after each signed an agreement we took the note. The agreement and the note are as follows”:

The notes in suit were signed by the defendants except Matsuno solely in pursuance of this so-called agreement, and there was no other consideration therefor. So far as Matsuno’s note is concerned there is no basis whatever for any claim that there was a sufficient consideration. Subsequently, in the latter part of August, 1909, each of the defendants, being dissatisfied with the conditions existing at the Ninth Street Market, left the same, and re-established himself for the sale of his produce at the Third Street Market. Thereupon T. Izumi, who testified that he was the treasurer of the Japanese Farmers’ Association, indorsed these notes to the respective plaintiffs. The indorsement in the first case, the others being similar in form, was as follows: “Pay to F. Nakagawa, Japanese Farmers’ Ass’n. By T. Izumi.” Izumi testified substantially that he was never formally directed or authorized to make any such transfer. He said that “the board of directors have nothing to do with the assignments in these

cases," and that "there wasn't any meeting about it," and he did not intimate that he had any authority to transfer any property of the association.

At the close of the trial, the plaintiffs were allowed, over the protest of the defendants, to file amended complaints, setting up the so-called agreement, according to their construction of the same, and the notes, together with the circumstances under which it was claimed the agreement was entered into and the notes were given, and asking for judgment on the notes as specifying the amount of damage agreed upon by the parties for a violation of the agreement. It was stipulated that the allegations of the amended complaints should be deemed denied by the defendants, and that the defendants should have the benefit of the affirmative defenses set up in their original answers. The findings were in favor of the plaintiffs as to everything alleged by them, and against the affirmative defenses set up in the answers.

As might well be expected from a reading of the foregoing, many points are made against the judgment.

It is obvious from what we have said that the judgment in the action against Matsuno is erroneous. As to him, at least, the note given was absolutely without consideration. He was not a party to the so-called agreement, and neither received nor was promised anything of benefit in consideration for his note.

As was held by the district court of appeal of the second district in deciding these cases, there was not sufficient evidence to show an assignment to the respective plaintiffs by the "Japanese Farmers' Association" or the members thereof of any of the notes or obligations. Therefore the finding on the issue of assignment in each case should have been in favor of the defendant instead of the plaintiff, the burden of proof being on the plaintiff to show his alleged assignment. The mere fact that the individual member who made the indorsement on each of the notes was the treasurer of the association is not sufficient to sustain a conclusion that there was an assignment, or to shift the burden of proof, as suggested. He did not even sign expressly as treasurer; confessedly he had not been expressly authorized by the association or the governing body thereof to make these particular assignments, there was no showing that under the articles of association

or any by-law or resolution the treasurer had any authority to sell or dispose of the assets of the association, or to assign any of its obligations; or even that the articles of association provided for a treasurer; or even, indeed, that there were any articles of association. Nor do we understand, as suggested by learned counsel for plaintiffs, that such assignments are acts within the usual powers of a treasurer.

There was no proof of actual damage to the Japanese Farmers' Association, or any of the members thereof, resulting from the withdrawal of defendants from the Ninth Street Market and their return to the Third Street Market. Judgment for any of the plaintiffs can be sustained only on the theory that the case is one where the parties have agreed upon the amount of five hundred dollars as the amount of damage that will be sustained by a breach of the so-called agreement, in view of the fact that, from the nature of the case it would be impracticable or extremely difficult to fix the actual damage (Civ. Code, sec. 1671), in other words, that the provision is one for liquidated or stipulated damage, which may be recovered upon a simple showing of breach of the agreement without any showing of damage. "But where it appears that the parties intended the sum named to be a forfeiture or penalty, it has been generally held that the party in whose favor the penalty or forfeiture exists must prove his damage." (*Muldoon v. Lynch*, 66 Cal. 540, [6 Pac. 417].) If in the nature of a penalty, rather than liquidated damages, it is not an actual debt, and cannot be recovered, but only the real damages which have to be proved. (1 Sutherland on Damages, sec. 283.) In determining whether a provision in a contract is for liquidated damage or for a penalty, "the fundamental rule, so often announced, is that the construction of these stipulations, depends, in each case, upon the intent of the parties, as evidenced by the entire agreement construed in the light of the circumstances under which it was made." (Id.) To our minds it is impossible to read the so-called agreement in the light of the circumstances that we have set forth without being convinced that the provisions as to the notes were intended purely by way of penalty or forfeiture, and without any reference to the question of damage. The sole design of these provisions was apparently to furnish a club to be used to prevent any person signing the agreement from returning

to the Third Street Market, by making him liable to a penalty or fine of five hundred dollars if he so did, absolutely irrespective of any question of damage. This object is plainly avowed in the preamble on the minutes of the Japanese Farmers' Association, which we have hereinbefore set forth. It is furthermore expressly avowed, in effect, in the agreement itself, and there is nothing in the circumstances shown by the evidence to detract in the slightest degree from the effect of the language used in the writing. In the absence of proof of actual damage there could, therefore, be no recovery either on the agreement or on the notes.

In view of our conclusion on the questions already discussed, it is unnecessary to notice any of the many other points made for reversal.

The judgment and order denying a new trial in each of the cases are reversed.

Shaw, J., Sloss, J., Melvin, J., and Henshaw, J., concurred.

[Crim. No. 1771. In Bank.—February 19, 1913.]

In the Matter of the Application of CHARLES ZANY for a
Writ of Habeas Corpus.

HABEAS CORPUS—SUPREME COURT CANNOT TRANSFER PROCEEDING AFTER DECISION OF DISTRICT COURT OF APPEAL.—The supreme court, after the decision of the district court of appeal in a *habeas corpus* proceeding, has no power to transfer such proceeding to the supreme court for a hearing therein.

ID.—CONCURRENT POWERS OF SUPERIOR AND SUPREME COURTS IN HABEAS CORPUS.—Prior to the establishment of the district court of appeal it had always been, and it now is, the law in this state that the decision of any court in a *habeas corpus* proceeding, provided the court has jurisdiction, cannot be reviewed by any other court in any way. The right of appeal has never been given, and no other method for such review has ever been provided. With reference to such proceedings, the supreme and superior courts, to each of which was given the power to issue writs of *habeas corpus*, stood upon the same plane, neither being inferior to the other in any other sense than that a superior court in determining any such matter

would naturally follow a precedent established by the highest court in the state, if any such precedent had been established. It, however, had the power to disregard it, and its determination, whether in accord with the law as laid down by the supreme court or not, was an end of the particular proceeding, and in case of the discharge of the petitioner from custody was final and conclusive.

Id.—CONSTITUTIONAL GRANT OF POWER TO DISTRICT COURTS OF APPEAL.

The power given by the constitution to the district courts of appeal to issue writs of *habeas corpus* is conferred in practically the same language as is used with reference to superior courts and the supreme court, and the language used must be taken as indicating the intention to confer the same power that had already been given to the superior and the supreme courts, with all the incidents thereof.

Id.—CONSTRUCTION OF CONSTITUTION—PROVISION GIVING SUPREME COURT THE APPELLATE JURISDICTION OF DISTRICT COURT OF APPEAL.

The provision of the constitution that the supreme court "shall also have appellate jurisdiction in all cases, matters and proceedings pending before a district court of appeal which shall be ordered by the supreme court to be transferred to itself for hearing and decision as hereinafter provided," was not designed to create a right of appeal in any matter, or to give appellate jurisdiction to the supreme court in any matter where no right of appeal was given by some other provision of law. Its whole design was to give to the supreme court the *appellate jurisdiction of the district court of appeal* in any case, matter or proceeding, which might be legally transferred from such district court of appeal to the supreme court.

Id.—POWER TO TRANSFER PENDING CAUSE.—The provision of the constitution, that "the supreme court shall have power . . . to order any cause pending before a district court of appeal to be heard and determined by the supreme court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within thirty days after such judgment shall have become final therein. The judgments of the district courts of appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced," is inapplicable to *habeas corpus* proceedings.

Id.—MEANING OF PHRASE "ANY CAUSE PENDING."—The words "any cause pending" used in that provision may reasonably be construed, in the connection in which they are used, as not intending to include and as not including any matter, such as a *habeas corpus* proceeding, as to which the well settled law excludes the idea of any right of review, except where there is a lack of jurisdiction. At any rate, the power of the supreme court to order a transfer is expressly limited to "any cause pending before a district court of appeal." A *habeas corpus* proceeding cannot fairly be said to be so "pending" at any time after judgment by such court. Such

a proceeding is finally and definitely ended by the judgment, and if the petitioner be ordered discharged thereby, he is at once restored to liberty.

APPLICATION to the Supreme Court to transfer to it a proceeding in habeas corpus, after the decision therein of the District Court of Appeal of the Third District.

The facts are stated in the opinion of the court. The opinion of the District Court of Appeal discharging the petitioner is reported in 20 Cal. App. 360, [129 Pac. 295].

Ben. Berry, and Gordon A. Stewart, for Petitioner.

L. J. Maddux, District Attorney, and J. E. Pemberton, for Respondent.

ANGELLOTTI, J.—An order denying the application for a hearing in this court, after decision by the district court of appeal for the third district discharging the petitioner from custody, was made by this court on January 13, 1913. We deem it proper to say that the order denying the application was made without regard to the merits of the decision of the district court of appeal, which we have not considered and as to which we express no opinion, and solely upon the ground that this court has no such power of transfer in *habeas corpus* proceedings.

Such has been our ruling as to all such applications heretofore made, there having been several such applications since the establishment of our district courts of appeal. The court, however, has never heretofore stated in writing the ground upon which such denials were ordered.

It has always been the law in this state that the decision of any court in a *habeas corpus* proceeding, provided the court has jurisdiction, cannot be reviewed by any other court in any way. The right of appeal has never been given, and no other method for such review has ever been provided. We are speaking now without regard to the provisions of our constitution relative to district courts of appeal, which we will consider later. The result has been that, with reference to such proceedings, the supreme and superior courts, to each of which was given the power to issue writs of *habeas corpus*,

stood upon the same plane, neither being inferior to the other in any other sense than that a superior court in determining any such matter would naturally follow a precedent established by the highest court in the state, if any such precedent had been established. It however had the *power* to disregard it, and its determination, whether in accord with the law as laid down by the supreme court or not, was an end of the particular proceeding, and in case of a discharge of the petitioner from custody was final and conclusive. Such is still the law with relation to the superior court of the state, as was recently decided by this court in *Bank*, Mr. Justice Shaw writing the opinion. (See *In re Hughes*, 159 Cal. 360, [113 Pac. 684].) Where a petitioner was remanded to custody by a superior court, and the proceeding instituted in that court was thus terminated and was no longer a matter *pending therein*, he could inaugurate a *new proceeding* for relief in another court and can still do so, but is now limited in the making of a new application by statutory provision to a higher court, either the district court of appeal having jurisdiction, or the supreme court. Such was the only remedy afforded by our law to the petitioner when remanded, and, as we have said, a discharge from custody by a superior court was final and conclusive.

When our district courts of appeal were established, power was expressly conferred upon them by the constitution "to issue writs of . . . *habeas corpus*" within their respective jurisdictions. As was already the situation with reference to justices of the supreme court, each of the justices of the court of appeal was given power to issue such writs returnable "before himself." It is self-evident that by these provisions it was intended to place such courts and the justices thereof in the same position with reference to *habeas corpus* matters, that the supreme and superior courts were already in. It is not conceivable that it was intended that these appellate courts should have less power than the inferior superior courts in such matters, as would be the case if their determination in *habeas corpus* proceedings were reviewable by the supreme court. As a matter of fact, the power to issue writs of *habeas corpus* was conferred in practically the same language as is used with reference to superior courts, and the supreme court, and the language used must be taken as indicating the inten-

tion to confer the same power that had already been given to the superior and the supreme courts, with all the incidents thereof.

It is by reason of certain other provisions of the constitution relative to district courts of appeal, that reliance is placed for the claim that the supreme court may review a decision of a district court of appeal in a *habeas corpus* proceeding, although it may not review a decision of a superior court in such a matter. The first of these is the provision that the supreme court "shall also have appellate jurisdiction in all cases, matters and proceedings pending before a district court of appeal which shall be ordered by the supreme court to be transferred to itself for hearing and decision as hereinafter provided." It is obvious that it was not the design of this provision to create a right of appeal in any matter, or to give appellate jurisdiction to the supreme court in any matter where no right of appeal was given by some other provision of law. The whole design was simply to give to the supreme court the *appellate jurisdiction of the district court of appeal* in any case, matter or proceeding, which might be legally transferred from such district court of appeal to the supreme court. The other provision relied on is the following: "The supreme court shall have power . . . to order any cause pending before a district court of appeal to be heard and determined by the supreme court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within thirty days after such judgment shall have become final therein. The judgments of the district courts of appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced." To hold this provision applicable to *habeas corpus* proceedings would be productive of some peculiar results. As we have already seen, it would render a determination of a superior court in such a proceeding one of greater dignity and more effective than that of a district court of appeal, in so far as the possibility of any review by the supreme court is concerned. The determination of a superior court would not be so reviewable, while that of a district court of appeal could be so reviewed. Likewise, it would make the decision of a single justice of a district court of appeal in such a matter, where he had made the writ returnable before himself, more

effective and of greater dignity than the decision of three justices of such court sitting as a *court*. It would moreover seriously impair the efficacy of the remedy of *habeas corpus*, in so far as the district courts of appeal are concerned: 1. By preventing one who was improperly remanded to custody by such a court from immediately inaugurating a new proceeding in the supreme court, and requiring him to remain in custody at least thirty days before the order for a transfer could legally be made by the supreme court and the inquiry as to the legality of his custody be commenced by such court; and 2. By preventing any judgment of discharge from being effective as a judgment until the expiration of the time within which such an order of transfer might legally be made by the supreme court, viz.: sixty days, and this without any provision under which the person found by the district court of appeal to be illegally confined could, pending further proceedings, be temporarily released from such custody. It goes without saying that an intention to accomplish any such result, so absolutely at war with the whole purpose and scheme of the remedy by *habeas corpus*, which was designed to summarily release a person from an unlawful custody, should be most clearly and unequivocally expressed, before this court should declare the law to be so written. In view of what we have said as to the well settled law relative to *habeas corpus* proceedings, we feel that it is a reasonable construction of the provision of the constitution under discussion, that it does not include such proceedings. The words "any cause pending" used therein may reasonably be read, in the connection in which they are used, as not intended to include and as not including any matter as to which the well settled law excludes the idea of any right of review, except where there is a lack of jurisdiction. Such clearly is a *habeas corpus* proceeding. But, at any rate, the power of the supreme court to order a transfer is expressly limited to "any cause *pending* before a district court of appeal." A *habeas corpus* proceeding cannot fairly be said to be so "pending" at any time after judgment by such court. Such a proceeding is finally and definitely ended by the judgment, and if the petitioner be ordered discharged thereby, he is at once restored to liberty. The constitutional provision should be considered in the light of this well recognized law, and so considered it appears to us to be

a reasonable construction thereof to hold that it does not include *habeas corpus* proceedings.

Besides uniformly denying such applications for transfer of such matters as have heretofore been made, we have also uniformly, without dissent, immediately entertained original applications for writs on behalf of persons remanded to custody by district courts of appeal, made at any time after such remand and within sixty days thereof, which we would have no right to do if the power of transfer existed. It has also been the uniform practice of our district courts of appeal in *habeas corpus* proceedings, where the justices of any such court were unable to agree upon the merits of the application, to remand the petitioner to custody, upon the ground that they are unable to agree upon his discharge, those courts, under the constitution, having no power to decide any matter except by unanimous vote. This is a practice fully authorized by the views expressed in such cases as *Santa Rosa etc. Co. v. Central St. Ry. Co.*, 112 Cal. 436, [44 Pac. 733]; *Frankel v. Deidesheimer*, 93 Cal. 73, [28 Pac. 794], and *Luco v. De Toro*, 88 Cal. 26, [11 L. R. A. 543, 25 Pac. 983], which practically authorize an affirmance of proceedings below, where the concurrence of the necessary number of justices in any other action cannot be obtained. Such a remand, of course, terminates the proceeding in that court. It may further be said that the legislature has practically construed the constitutional provision as not including *habeas corpus* proceedings, by recognizing in section 1475 of the Penal Code, the right to an original application to the supreme court in the event of a denial of relief by a district court of appeal.

No very dire results are to be apprehended from this construction of the constitutional provision. Certainly the situation is no worse by reason thereof than it has been during all of the period preceding the establishment of our district courts of appeal. If it develops that there is any substantial conflict between decisions of different district courts of appeal on any question presented on an application in *habeas corpus*, consideration of the question can be had by this court on an original application for a writ of *habeas corpus* to this court by the person remanded to custody. The general questions involved in this particular case are already before this court for

consideration in a proceeding of another character transferred from the district court of appeal of the second district.

For the reasons stated we have always heretofore ruled that we have no such power to transfer in *habeas corpus* proceedings, and we adhere to such conclusion.

Henshaw, J., Sloss, J., Melvin, J., and Lorigan, J., concurred.

SHAW, J., dissenting.—A majority of this court has heretofore in several instances tacitly held that the supreme court has no power to transfer a case in *habeas corpus* from a district court of appeal to the supreme court for a rehearing. I have never agreed to such construction of the constitution. In my opinion it is directly contrary to the constitutional provisions on the subject. The language conferring the power is so clear and plain that no interpretation is necessary. The district courts were created by a constitutional amendment adopted in 1904 amending several sections of article VI. Section 4 contains this clause:

“The supreme court shall have power to order any cause pending before the supreme court to be heard and determined by a district court of appeal, and to order any cause pending before a district court of appeal to be heard and determined by the supreme court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within thirty days after such judgment shall have become final therein. The judgments of the district courts of appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced.

“The supreme court shall have power to order causes pending before a district court of appeal for one district to be transferred to the district court of appeal of another district for hearing and decision.”

This provision expressly gives the supreme court power to transfer *any cause*. This includes cases in *habeas corpus* as clearly as it includes any other kind of action. The word “cause” includes proceedings in *habeas corpus*. Bouvier defines the word “cause,” when used to refer to judicial proceedings, as “A suit or action. Any question, civil or criminal, contested before a court of justice.” (Vol. 1, p. 295.

See, also, Webster's Dictionary and Standard Dictionary.) There are many decisions of like effect. (*Taylor v. United States*, 45 Fed. 531; *Erwin v. United States*, 37 Fed. 470, [2 L. R. A. 229]; *In re Farnum*, 51 N. H. 383; *Naconchee H. M. Co. v. Davis*, 40 Ga. 320; *Bridgton v. Bennett*, 23 Me. 425.) The two cases first cited hold that a proceeding to punish a witness for contempt of court is a "cause." In the *Bridgton* case the court said: "A term more comprehensive could not have been readily selected."

The context of section 4 shows that proceedings in *habeas corpus* were intended to be included in the term "cause" in the paragraphs above quoted. The first paragraph of the section defines the appellate and original jurisdiction of the supreme court. With respect to the latter, it declares that it shall have "power to issue writs of *mandamus*, *certiorari*, prohibition and *habeas corpus*." Following are provisions defining the boundaries of the several districts of the state. Then comes a paragraph defining the original and appellate jurisdiction of the district courts of appeal. Their original jurisdiction is declared to include "power to issue writs of *mandamus*, *certiorari*, prohibition and *habeas corpus*." Then follows the clause first above quoted giving the supreme court power to transfer "any cause" to or from either court. In cases of *mandamus*, *certiorari*, and prohibition, begun in the district court, the supreme court has always recognized and has frequently exercised this power of transfer. By the above quoted clauses the proceeding in *habeas corpus* is placed in the same category with the classes of cases just mentioned. It seems indisputable that the court must have the same power to transfer in *habeas corpus* as in the other cases. If a case in one of the classes first named is a "cause," a proceeding in *habeas corpus* must also be a "cause" within the meaning of the section.

Furthermore, section 24 of the same article, being a part of the same amendment, provides that if the justices of a district court "are unable to concur in a judgment, they shall give their several opinions in writing and cause copies thereof to be forwarded to the supreme court." It does not provide for a transfer to the supreme court in such cases. The paragraph of section 4, first quoted, has always been considered to authorize such transfer and transfers are made accordingly.

It was evidently intended to include cases where there was a disagreement in the district court, as well as other cases, in order to avoid the predicament of absolute inability of the district court to dispose of the cause, or the imperative necessity, under the reasons given in *Luco v. De Toro*, 88 Cal. 26, [11 L. R. A. 543, 25 Pac. 983], for some of the justices to concur in a judgment which they believe to be erroneous, merely to end the litigation. There is absolutely no good reason for forcing the justices of that court to do this in *habeas corpus* cases alone when it can be avoided by allowing section 4 to have the effect which its words express.

The fact that the supreme court has heretofore entertained original applications in *habeas corpus* by persons who have been remanded on a similar application to the district court, and the fact that the legislature has recognized its power to do so, is without argumentative force. The power is given by the constitution. The legislature can neither take it away nor confer it, nor does legislative sanction strengthen it. A judgment in *habeas corpus* refusing to discharge a person in custody on a criminal charge is no bar to a subsequent writ in any court for the same cause. It is a bar only where there is a discharge, or where two persons are contending for the right to the custody of a third person. (1 Freeman on Judgments, sec. 324; *Ex parte Perkins*, 2 Cal. 424; *Ex parte Ring*, 28 Cal. 251.) This principle gives this court full power to entertain such applications after a judgment of remand in the district court and the exercise of this power heretofore has been wholly attributable to this reason and not to the theory that no power existed to order a transfer. No application for a transfer to this court from a district court has ever been made in a case where the right to custody of a third person was in issue and the district court had given judgment upon it. Being a former adjudication, there would be no right or power of review in any court, unless this court has power, under section 4, aforesaid, to vacate the decision of the district court of appeal and transfer the cause to the supreme court for a rehearing. If the power exists in that case, it must exist in all cases.

The argument that the provision should not be given effect to allow transfers from district courts, because hitherto no appeal has ever been provided in this state from a decision in

habeas corpus by a superior court or judge thereof, or by a justice of the supreme or district court, I cannot understand. If the words are unambiguous, as I think must be admitted, and the power of transfer is given thereby, the giving or withholding of the right of appeal from decisions of other tribunals by other statutes or parts of the constitution has no bearing upon the meaning of this particular part of the constitution. Such analogies are significant only when there is an ambiguity to clear up. That there should be a right of appeal by the state from the judgment of the superior court discharging a prisoner is shown by the result of the Hughes case (159 Cal. 360, [113 Pac. 684]), where a prisoner in Folsom state prison, regularly convicted and sentenced by the superior court of one county, was released without legal cause by the superior court of another county, and the state was declared to be remediless. Moreover, the legislature could at any time destroy this argument by providing for an appeal in such cases. The argument amounts to only this, that since a defect in one part of our judicial system has been suffered to continue so long, although it has caused some miscarriages of justice, it must be assumed that a constitutional provision designed to avoid a similar defect in the district court system does not mean what it plainly says, because to give it such effect would make the system different in that respect from any that has heretofore been established. It seems to me that the obvious defect existing as to superior courts furnishes a good reason for avoiding it in the newly created jurisdiction and for giving the provision that effect, even if it were not clear, but might reasonably be so construed.

The decision defeats to a very large and important extent one of the main objects for which this power of transfer was given. In *People v. Davis*, 147 Cal. 348, [81 Pac. 718], this court declared that the power to transfer was given to make the supreme court the court of final decision upon all important questions of law and to enable it to supervise the decisions of the several district courts of appeal, in order to secure a uniform rule of decision throughout the state. The proceeding in *habeas corpus* is resorted to, more than any other form of action, to obtain decisions upon the construction, constitutionality, and effect of penal laws. The result of this decision is that we may have in this state three independent judicial

systems, each construing and giving effect to statutes, charters, and the constitution, in their own way and differently from the others, without there being any means of revising or harmonizing their decisions, except upon the chance that some other person may bring a case in the supreme court involving the same question. The experience of eight years which have elapsed since the district courts were created demonstrates that this chance never happens when a decision of the district court is against the state.

For these reasons I am of the opinion that the power to transfer exists in cases of proceedings in *habeas corpus* as fully as in any other kind of action or proceeding, and that to hold otherwise is contrary not only to the letter but also to the purposes of the constitutional provision.

[Crim. Nos. 1749, 1750. In Bank.—February 19, 1913.]

In Re E. S. POTTER, on Habeas Corpus.

PHARMACY AND POISON ACTS IN PARI MATERIA—HARMONIOUS CONSTRUCTION—POWER OF PHARMACY BOARD TO MAKE REGULATIONS.—

The so-called "Pharmacy Act" of 1905 (Stats. 1905, p. 535), as amended in 1909 (Stats. 1909, p. 1013), and the so-called "Poison Act" of 1907 (Stats. 1907, p. 124), as subsequently amended (Stats. 1909, p. 422; 1911, p. 1106), are *in pari materia*, dealing in many particulars with the same subject matter, and are to be construed and harmonized, if possible. So construed, the power is expressly conferred upon the board of pharmacy to promulgate "regulations not inconsistent with the laws of this state as may be necessary for the protection of the public" in the sale of poisons.

ID.—REGULATIONS MUST NOT BE INCONSISTENT WITH LAWS.—The power of the board in that respect is limited to the adoption of such regulations as are not "inconsistent with the laws of this state."

ID.—GROCERS AUTHORIZED TO SELL CERTAIN POISONOUS PREPARATIONS IN ORIGINAL PACKAGES—PHARMACY BOARD CANNOT DESTROY RIGHT TO SELL.—Section 16 of the so-called Pharmacy Act as amended in 1909, expressly authorizes the sale by grocers and dealers generally of certain enumerated articles containing arsenic and other poisons, "when prepared and sold only in original and unbroken packages and labeled with the official poison labels," and the pharmacy board has no power to enact a regulation which would, in

effect, deprive grocers of their right to sell any ant poison which might be an arsenical compound, and to limit the right of sale of such poisons to regular licensed pharmacists.

ID.—DELEGATION BY LEGISLATURE OF POWER TO MAKE REGULATIONS.—

The legislature has power to delegate to proper authority the making of suitable rules and regulations for the conduct and transaction of any branch of the business of the state, and to declare a violation of those rules a penal offense.

ID.—CONSTITUTIONALITY OF POISON ACT.—The so-called Poison Act of March 6, 1907, is constitutional.

ID.—AMENDMENT OF 1911 TO POISON ACT—PHARMACY ACT NOT RE-

PEALED.—The amendment of 1911 to the Poison Act, by the provision regulating the vending of opium and its derivatives, cocaine, chloral hydrate, and other like drugs and poisons, did not have the effect to re-enact the Poison Act as of the date of the amendment, and thus to repeal by implication the authority in the Pharmacy Act for the sale of certain poisons by grocers.

APPLICATION for a Writ of Habeas Corpus directed to the Chief of Police of the City of Los Angeles.

The facts are stated in the opinion of the court.

Parker & Moote, for Petitioner.

John D. Fredericks, District Attorney, Guy Eddie, City Prosecutor, Frank W. Stafford, Assistant City Prosecutor, and L. H. Roseberry, Special Prosecutor, for Respondent.

HENSHAW, J.—Petitioner is held under arrest by virtue of two criminal complaints, the one charging him with a violation of the so-called "Poison Act," the other with a violation of a resolution and regulation prescribed by the state board of pharmacy under and by virtue of certain provisions of the Poison Act. The legal questions presented under the two applications are intimately related and may be considered together.

The so-called "Poison Act" is "An act to regulate the sale of poisons in the state of California and providing a penalty for the violation thereof." It was approved March 6, 1907. (Stats. 1907, p. 124.) It has been amended in 1909 (Stats. 1909, p. 422), and again in 1911 (Stats. 1911, p. 1106). But these amendments do not affect the original act as to any of

the legal questions herein to be considered. The Poison Act enumerated many poisonous, deleterious and injurious drugs and other substances in a list called "schedule A." It regulated the sales of the articles in schedule A, and in section 4 provided:

"When in the opinion of the state board of pharmacy, it is in the interest of the public health, they are hereby empowered to further restrict, or prohibit the retail sale of any poison by rules not inconsistent with the provisions of this act, by them to be adopted, and which rules must be applicable to all persons alike. It shall be the duty of the board, upon request, to furnish any dealer with a list of all articles, preparations and compounds, the sale of which is prohibited or regulated by this act."

A violation of any of the provisions of the act was declared to be a misdemeanor and an appropriate penalty was prescribed. Standing at the head of the list enumerated in schedule A is "arsenic, its compounds and preparations."

The "Pharmacy Act," "An act to regulate the practice of pharmacy in the state of California," was originally adopted in 1905. (Stats. 1905, p. 535.) It declared in section 1: "From and after the passage of this act it shall be unlawful for any person to manufacture, compound, sell, or dispense any drug, poison, medicine or chemical, or to dispense or compound any prescription of a medical practitioner, unless such person be a registered pharmacist, or a registered assistant pharmacist within the meaning of this act, except as hereinafter provided." Amongst the powers conferred upon the board of pharmacy created thereby, was the power "to regulate the sale of poisons." In 1909 (Stats. 1909, p. 1013) section 16 of the act was amended. This amendment contained much new matter. Thus, it made provision for the board of pharmacy to issue a permit to general dealers in rural districts to sell drugs and ordinary household remedies until such time as "a registered pharmacist shall establish a pharmacy within three miles by the shortest road from the place of business of such general dealer," when no further permit was to be granted. It then provided (and this is the provision bearing upon the questions before the court) that "the following drugs, medicines and chemicals may be sold by grocers and dealers generally without restriction." Then fol-

lowed an enumeration of many articles, the list concluding with "insect powder, fly paper, ant poison, squirrel poison, and gopher poison, and arsenical poisons used for orchard spraying, when prepared and sold only in original and unbroken packages and labeled with the official poison labels."

The state board of pharmacy adopted a regulation as follows:

"Whereas, complaint and knowledge has come to this board that during the year last past not less than two deaths have come to children from Kellogg's Ant Paste (an arsenical preparation) and it appearing to this board that to more fully protect the public health the delivery and sale of this preparation should be more strictly safeguarded, it is hereby resolved by this board:

"That the sale of this preparation will hereafter be permitted only when said sales are made as required for all sales of arsenic and its preparations (*vide* schedule A) and in absolute compliance with sections 1, 2 and 3 of the 'act to regulate the sale of poisons in the state of California.' "

The effect of this resolution, if valid, is to deprive grocers of their right to sell any ant poison which might be an arsenical compound, and to limit the right of sale of such poisons to regular licensed pharmacists.

The laws have thus been set out. The facts are that petitioner is a grocer and was arrested for selling Kellogg's Ant Paste, an ant poison containing arsenic. He bases his right so to do upon the above quoted provision of section 16 of the Pharmacy Act, and contends that the regulation of the board of pharmacy, by which he is forbidden so to do, is an illegal effort to deprive him of a right accorded him by positive law. Upon the other hand, respondent contends that the power to regulate the sale of poisons is expressly conferred upon the board of pharmacy, and that in the exercise of that power it is legal to regulate the sale of arsenical compounds and to place the sale of such compounds exclusively under the control of registered pharmacists, under the provisions of sections 1 and 4 of the Poison Act.

Sections 1, 2, and 3 of the Poison Act, to which reference is made in the resolution of the board of pharmacy, throw certain precautionary limitations and restrictions around the sale of poisons. A book for the entry of sales is required,

with the name, address, and signature of the purchaser, and the quantity of poison sold; a form of label is prescribed which shall bear a skull and cross bones and contain the word "poison"; the name of an antidote, or of suitable common antidotes shall be printed on the label, and the board of pharmacy shall have power to revise and amend the list of antidotes. But, besides being regulatory in the matter of the vending of poisons, sections 1, 2, and 3 of the "Poison Act" are also restrictive. They limit the right to sell, to registered pharmacists alone.

It is manifest from a reading of the Pharmacy Act and the "Poison Act" that they are statutes *in pari materia*, dealing in many particulars with the same subject matter, and are to be construed and harmonized, if possible. And so reading and construing them, the power is expressly conferred upon the board of pharmacy to promulgate "regulations not inconsistent with the laws of this state as may be necessary for the protection of the public" in the sale of poisons. But the very apparent and declared limitation upon the power of the board in this respect is to adopt such regulations as are "not inconsistent with the laws of this state," and the conclusion cannot be avoided that the regulation here under consideration is in direct conflict with an express law of the state—a law which expressly empowers grocers, such as the defendant, to sell ant poisons "when prepared and sold only in original and unbroken packages and labeled with the official poison labels." For, upon most manifest considerations of public welfare, we construe the phrase last quoted to apply to all poisons permitted to be sold by grocers. Little difficulty would be experienced if the regulations here under consideration went no further than to require grocers and dealers generally to adopt the same measures and precautions exacted of registered pharmacists under sections 1, 2, and 3 of the act. Regulations, such as these, in the nature of things, would not be held unreasonable. But the regulation in question unfortunately goes further and, as we have said, bars the grocers and dealers generally from an express right conferred upon them by statute. For, construing these two acts by their terms, they amount to this: that restrictions are cast around the sale of poisons, both as to the persons who may sell and the methods by which the sales may be made. These sales, generally

speaking, may be made only by a registered pharmacist or a registered assistant pharmacist, and the board of pharmacy may make reasonable regulations in addition to those prescribed by the state, and may add to the list contained in schedule A of poisonous, deleterious and injurious substances, any other such as in its view should properly be placed there. But with this limitation, however, that certain designated articles may be sold by grocers and dealers generally, amongst which is ant poison in original and unbroken packages. Indeed, so far as the safety of the public is concerned, if the board of pharmacy had seen fit to impose upon the grocers and dealers the same restrictions and regulations that are or may be imposed upon the registered pharmacists, everything desirable would have been accomplished. The same safeguards and precautions would then attend the sale, whether by pharmacist or grocer, and no one would contend that any greater safety to the public would arise if the original package of poison were handed out by a drug clerk than would attach if it were delivered by a grocery clerk.

Under the view thus expressed, we need not be at pains to follow counsel through their discussion of the law touching the power of the legislature to delegate its functions, or touching the power of some designated inferior board or tribunal to create or declare a crime. For, having determined that the regulation itself is not one within the power of the board of pharmacy to pass, all other considerations become subordinate and unnecessary. In passing, however, it is proper to say that no doubt, of course, can be entertained of the legislative power to delegate to proper authority the making of suitable rules and regulations for the conduct and transaction of any branch of the business of the state, and for the same legislative power to declare a violation of those rules a penal offense. (*United States v. Moody*, 164 Fed. 269; *United States v. Grimaud*, 220 U. S. 506, [55 L. Ed. 563, 31 Sup. Ct. Rep. 480].)

What has already been said sufficiently indicates our views and the reasons therefor, to the effect that the Poison Act itself is not unconstitutional.

In 1911 the Poison Act was amended by provision regulating the vending of opium and its derivatives, cocaine, chloral hydrate, and other like drugs and poisons. Respondent ar-

gues that the legal effect of this amendment is to re-enact the Poison Act as of the date of the amendment, and thus to repeal by implication the authority in the Pharmacy Act for the sale of certain poisons by grocers. But this would be carrying the doctrine of repeals by implication to a most extraordinary length and would do violence to the express terms of the law. (Pol. Code, sec. 325; *Swamp Land etc. v. Glide*, 112 Cal. 90, [44 Pac. 451].) Counsel admit their inability to furnish authority sustaining the doctrine of such a repeal, and the absence of such authority is a strong argument against the soundness of the doctrine. The law of course is that repeals by implication are not favored, and they are declared only where an absolute repugnancy between laws exists. Here no such repugnancy exists, and it is the duty of the court to reconcile rather than to destroy. The harmony between and the reconciliation of the terms of the two statutes is abundantly established by treating the authority to the grocers to vend certain poisons as an exception to the general law.

It follows herefrom that the criminal complaints against this defendant charge no crime and that therefore he is entitled to his liberty.

It is therefore ordered that the petitioner be discharged from custody.

Shaw, J., Sloss, J., Angellotti, J., and Melvin, J., concurred.

[L. A. No. 2994. Department Two.—February 20, 1913.]

MARY B. N. CLAPP, and E. P. CLAPP, her Husband,
Appellants, v. F. S. CHURCHILL et al., Respondents.

BOUNDARIES—AGREED LINE—UNCERTAINTY AS TO TRUE BOUNDARY.—The doctrine of an agreed boundary line and its binding effect upon the conterminous owners rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line. When that uncertainty exists, or is believed by them to exist, they may amongst themselves by agreement, fix the boundary line, and that agreement will bind all the consenting parties.

ID.—ACQUIESCENCE IN LINE—UNCERTAINTY AS TO TRUE LINE ESSENTIAL TO AGREEMENT FIXING DIFFERENT LINE.—Acquiescence is merely evidence of the agreement and can properly be considered as evidence of an agreement only when a formal agreement would itself have made a binding contract. But a formal agreement to fix the boundary line is not valid, indeed is void, if the parties know, or one of them knows, that the agreed line is not the true line, or, in other words, if there be not an actual or believed uncertainty as to the true line. This is so because title to real property can be transferred only by descent, devise, conveyance *inter vivos*, or by adverse holding, and to allow parties where their common boundary line is not uncertain or in dispute by a mere agreement to give one title which belongs in another would be the recognition of a mode of transferring title not countenanced by law.

ID.—ESTOPPEL TO QUESTION LINE FIXED BY AGREEMENT.—When such an agreement has been deliberately entered into it is not the theory of the law that there has been a conveyance of any land from the one conterminous owner to the other, but it is that they have agreed between themselves as to the land which they respectively own under circumstances which estop either of them thereafter from denying it.

ID.—INFERENCES ARISING FROM ACQUIESCENCE—INFERENCES OF UNCERTAINTY DISPROVED BY EVIDENCE TO CONTRARY.—The inference of an agreement arising from acquiescence may support the added inference that the inferred agreement was based on a questioned boundary. The primary inference is of a valid pre-existing agreement, and to be valid that agreement must have been based on a doubtful boundary line. This inference of a doubtful boundary will not prevail against the proved fact to the contrary, that there was no question or doubt or dispute between both parties over the boundary.

ID.—ACTION TO DETERMINE BOUNDARY—INSUFFICIENT EVIDENCE OF UNCERTAINTY.—In an action to determine the common boundary line between the lands of conterminous owners, in which the plaintiffs sought to establish a line different from that called for in their deeds, under an agreement between such owners so fixing it, the evidence is held insufficient to show any uncertainty touching the boundary line which would support such an agreement.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial.
George H. Hutton, Judge.

The facts are stated in the opinion of the court.

W. I. Morrison, and F. G. Cruickshank, for Appellants.

G. A. Gibbs, and Richards & Carrier, for Respondents.

P. A. Bergerot, and A. P. Dessouslavy, *Amici Curiae*, on petition for hearing in Bank.

HENSHAW, J.—This action was brought to determine the common boundary line between plaintiffs' land upon the north and defendants' land upon the south, and to restrain defendants from cutting down and destroying a row of pomegranate trees which plaintiffs assert are upon and define the boundary line. A nonsuit was granted and from the judgment which followed plaintiffs appeal.

The land in controversy is a strip four or five feet wide and 590 feet long. There is no contention that there are any false calls in the deed to the plaintiffs nor that there is any discrepancy between the calls and visible and declared monuments. The deed of the plaintiffs, it is stipulated, is certain in its terms, and running the courses and distances of this deed, the boundary line is fixed four or five feet north of the row of pomegranate trees. Nor is this a case where the litigants hold from a common grantor, or where one, the owner of the whole tract, is the grantor of the other who thus becomes the owner of a portion of the tract. The case is one where plaintiffs to prevail must establish an uncertain boundary line, an agreement between the conterminous owners to fix that boundary line and the fixing of that line by agreement, or must establish their title by adverse possession. The motion for a nonsuit was addressed to the insufficiency of the evidence to show plaintiffs' ownership of the property by either method. Thus, as one of the grounds of the motion, it was urged that no adverse possession for the statutory period with payment of taxes had been proven, and upon the other it was urged "that the plaintiff has not been in possession with improvements of a substantial order for five years; and that there was no dispute shown or uncertainty to make an agreement as to what the boundary line should have been with anybody; and there is no estoppel; and no improvements have been made such as would make it equitable that the plaintiffs should recover."

Upon the matter of adverse possession there is no contention that it was proved by plaintiffs that any title was thus acquired. Whatever may have been plaintiffs' acts of dominion, ownership, and control over the disputed strip, it is un-

questioned that they did not pay the taxes thereon. The whole case, therefore, rests upon the proposition first set forth.

The action was brought in February, 1911. Plaintiffs acquired title to their property in 1905, more than five years prior to the commencement of the action. Title to plaintiffs' property stood in the name of Mary B. N. Clapp. Doctor Clapp, her husband, joined with her as plaintiff, testifies in substance, that in purchasing and entering into possession of the land he took it for granted that the southern boundary line was a row of pomegranate trees with a fence, or the remnants of a fence running through it. The fence was a wire fence supported partly by the pomegranate trees and partly by some two or three old posts. Only parts of the fence were there. He had a new fence put up to keep the boys out. There was a building, "a kind of barn and chicken corral, and a house at the southeast corner of lot 7, the south end was tight up against this hedge." He had it torn down. He always supposed that the pomegranate trees marked his southern line. He had openly occupied all the property up to the hedge. He trimmed the hedge on his side and planted nasturtiums and other flowers upon the strip but they did not grow well because of the hedge. He had built a garage at the southwest corner of the property. No part of the garage proper was upon the disputed strip. Its southern side corresponded exactly with the line of plaintiffs' property as called for in the deed. However, the original steps of the garage were built upon the disputed strip and these original steps were afterward torn down and replaced by new ones upon the same spot. No objection was made by any one to these acts of dominion and control. The witness did not know that the pomegranate hedge was not the true southern line until he had a survey made in accordance with the calls of his deed and found that his line was thus established four or five feet north of the line of pomegranate trees. He did not know that the boundary stakes were there along the true line until shortly before his testimony when he saw them uncovered. This is substantially the testimony to support plaintiffs' case. It is silent upon several important matters. There is no word of testimony that the defendants, or any one of them, believed or declared their northern boundary line to be uncertain. There is no testimony about any agreement

fixing the pomegranate hedge as the accepted boundary line because of such uncertainty, and the whole case of the plaintiffs resolves itself down to this, that plaintiffs did not know where the boundary line called for by their deed was, but supposed it to be the pomegranate hedge. There was no uncertainty even upon the face of the deed. The pomegranate hedge as the boundary line was a mere assumption upon their part. Plaintiffs exercised certain acts of dominion and control over the disputed strip. From the acquiescence by their silence of the conterminous owners to the south it is argued that this acquiescence having continued for a period equal to that required by the statute of limitations gives rise to the conclusive presumption of previous agreement, or if not to the conclusive presumption, at least to a presumption which has not been rebutted by any evidence.

But the doctrine of an agreed boundary line and its binding effects upon the conterminous owners rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line. When that uncertainty exists, or is believed by them to exist, they may amongst themselves by agreement, fix the boundary line, and that agreement will bind all the consenting parties. Acquiescence is merely evidence of the agreement and can properly be considered as evidence of an agreement only when a formal agreement would itself have made a binding contract. But a formal agreement to fix a boundary line is not valid, indeed is void, if the parties know, or one of them knows, that the agreed line is not the true line, or, in other words, if there be not an actual or believed uncertainty as to the true line. This is so because under our law title to real property can be transferred only by descent, devise, conveyance *inter vivos*, or by adverse holding, and to allow parties where their common boundary line was not uncertain or in dispute by a mere agreement to give one title which belongs in another would be the recognition of a mode of transferring title not countenanced by law. (*Lewis v. Ogram*, 149 Cal. 506, [117 Am. St. Rep. 151, 10 L. R. A. (N. S.), 610, 87 Pac. 60]; *Mann v. Mann*, 152 Cal. 23, [91 Pac. 994]; *Young v. Blakeman*, 153 Cal. 477, [95 Pac. 888]; *Loustalot v. McKeel*, 157 Cal. 634, [108 Pac. 707].) When such an agreement has been deliberately entered into it is not the theory of the law that there has been

a conveyance of any land from the one conterminous owner to the other, but it is simply that they have agreed between themselves as to the land which they respectively own under circumstances which estop either of them thereafter from denying it. This does not mean that the inference of an agreement arising from acquiescence does not support the added inference that the inferred agreement was based on a questioned boundary. The primary inference is of a valid pre-existing agreement and to be valid that agreement must have been based on a doubtful boundary line. But what is meant is that this inference of a doubtful boundary will not prevail against the proved fact to the contrary,—namely, that there was no question or doubt or dispute between both parties over the boundary.

In the case under consideration plaintiff's evidence completely breaks down in its failure to show an uncertainty touching the boundary line which would support such an agreement for, as is said in *Lewis v. Ogram*: "such an agreement necessarily is not valid for any other purpose than that of settling an uncertainty in regard to common boundary." Plaintiff shows that he did not know where the true boundary line was until he caused his land to be surveyed when it was easily determined. But his uncertainty was not the defendants' uncertainty, and there is not the slightest evidence that they considered that their northern boundary line was uncertain in its location. Therefore, the acquiescence of the defendants in the acts of the plaintiffs in their exercise of dominion over the strip might make against them for their failure to assert their right, if title were claimed by adverse possession, a claim which has heretofore been said could not, in this instance, be sustained. But it is without meaning or potency under the contention of an agreed boundary line because, as has been said and shown, an agreement fixing a common boundary line can only have efficacy where the true boundary is either uncertain in fact or is believed by the contracting parties to be uncertain.

The witness Doctor Clapp was asked the question: "Will you state what conversation you had with reference to the south boundary line of your property at the time you went into possession there?" He answered, "I did not have a very distinct conversation in the matter, but the boundary line was

indicated to me as the south side of that property, and I had no survey made of it." A motion to strike out the answer touching the conversation was made unless it was shown to have been a conversation with the defendants, and the motion was granted. The ruling was proper. The witness does not declare that this conversation was had with the defendants or any of them; he does not declare that the row of pomegranate trees was indicated to him as his boundary line. He had sufficiently indicated his own ignorance of his true boundary line and this evidence would not in the slightest tend to show that the defendants or any of them were in like ignorance.

Again the witness was asked: "State what you claimed as the south boundary line of your property during the time you were in possession?" While an objection to the question was made upon the ground that the evidence was inadmissible unless these claims were shown to have been brought to the knowledge of the defendants, and while the objection was sustained, nevertheless the witness was permitted to answer and did answer freely: "We occupied all of the property up to the hedge openly. . . . Since we came into possession we have occupied it."

A witness testified that he had sowed seeds for Doctor Clapp along the disputed strip, concluding his answer by saying, "and I have supposed that the hedge belonged to Doctor Clapp." The quoted portion of his answer was stricken out on motion. It is asserted that this was error. Clearly the supposition of the witness, even if it be dignified as do appellants by calling it his "opinion" touching the title to the property, was not admissible in evidence.

No other points upon the reception and rejection of evidence are made, and for the reasons given, the judgment and order appealed from are affirmed.

Melvin, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[L. A. No. 2974. Department Two.—February 21, 1913.]

HATTIE C. DANIELSON and EMIL A. DANIELSON,
Appellants, v. **ANN M. NEAL,** Respondent.

REFORMATION OF DEED—PRIOR DEMAND NOT NECESSARY TO ACTION.—An action will lie in this state for the reformation of a deed without a demand previously made.

ID.—PRIOR DEMAND WHEN ESSENTIAL TO CAUSE OF ACTION.—Wherever a right arises or is dependent upon demand, that is, when the demand is an integral part of the cause of action, it must be made before action brought. But when it is an unconditional duty of a defendant to perform a certain act, the suit itself is the only demand necessary. In some cases, no other consequences follow a failure to make demand before suit brought, than that the plaintiff will not be allowed to recover his costs.

ID.—QUANTITY OF LAND CONVEYED—"MORE OR LESS"—MISTAKE AS TO QUANTITY.—The inclusion in a deed of the words "more or less" in the description of the quantity of land conveyed, does not preclude a reformation of the deed for mistake in not embracing all the acreage agreed upon.

ID.—VALUE OF OMITTED LAND—REFORMATION NOT REFUSED BECAUSE OF SMALLNESS.—The fact that the value of the omitted land, upon the basis of the purchase price, was only eighty-three dollars, will not in itself prevent a court of equity from granting a reformation of the deed.

ID.—STATUTE OF LIMITATIONS—LACHES—ERROR PATENT ON FACE OF DEED.—Where the omission to convey all the land agreed upon was patent upon the face of the deed, the mere fact that the grantee failed to discover it does not charge him with laches, or set the statute of limitations in motion prior to the discovery of the mistake.

APPEAL from a judgment of the Superior Court of Santa Barbara County. S. E. Crow, Judge.

The facts are stated in the opinion of the court.

Day & Day, and William C. Day, for Appellants.

G. H. Gould, for Respondent.

HENSHAW, J.—Plaintiffs seek by their action the correction of two deeds made to them by defendant, the one for

three acres of land, the other for one acre of land. The facts touching the first deed sufficiently indicate the character of the mutual mistake which it is alleged existed in the making of both deeds. Those facts are that plaintiff, Hattie C. Danielson, bought of defendant three acres of land. It is alleged that these three acres were to have a southern frontage of 417.4 feet and "should be bounded on the east by the easterly line of defendant's land and on the south by the Southern Pacific Railroad Company's right of way, and should be so located that the lines should embrace just three acres of land, but that the lines should be in the proportion of two to three, so that two acres should front to the south and the one acre lying back should be just half the width of the other two acres." It is then alleged that by mutual mistake, ignorance, and oversight, the courses and distances actually given in the deed fell short of containing three acres, the allegation in this respect being the following:

"That the mistake in the amount of acreage as aforesaid, arose from the fact that the distances given in the deed and the length of the boundary lines would, if run at right angles, include the three (3) acres, but the lines and courses were not run at right angles to each other, and not being so run at right angles to each other, decreased the amount of acreage; the north and south lines, instead of running at right angles to the east line, which is a due north and south line with the deflection of only 15', varied from a right angle to said east line 7° and 53' and from the west line of said tract as designated in said deed to the same extent, leaving the southeast angle and the northwest angle obtuse ones 7° and 53' in excess of right angles and the southwest angle and the northeast angle 7° and 53' less than right angles, and by reason of such deflection of lines the east and west lines are brought much nearer together on a measurement on right angles than four hundred and seventeen and four-tenths (417.4) feet, which was intended, but leaves the north and south lines, three hundred and thirteen (313) feet apart as was intended."

The deeds so made were dated, one in July, 1906, the other the 21st of November, 1907, but plaintiffs allege that they did not discover the mistake until the fifteenth day of December, 1910, after survey made by the county surveyor. A

demurrer, general and special, was interposed and sustained to the complaint.

Judgment followed for defendant and plaintiffs appeal. In support of the judgment respondent contends that this action for reformation will not lie without a demand previously made, which demand is not here alleged. There is authority supporting this view, but such is not the rule of decision in this state, nor is it the rule of general adoption. Wherever a right arises or is dependent upon demand; in other words, when the demand is an integral part of the cause of action, it must be made before action brought. But when it is an unconditional duty of a defendant to perform a certain act, the suit itself is the only demand necessary. (*Gray v. Dougherty*, 25 Cal. 266; *Cox v. Delmas*, 99 Cal. 104, [33 Pac. 836]; 9 Cyc. 725.) In some cases, no other consequences follow a failure to make demand before suit brought, than that the plaintiff will not be allowed to recover his costs. (*Jones v. Petaluma*, 36 Cal. 230; *Heinlen v. Martin*, 53 Cal. 321.)

The first deed, after the description of the land, declared that it contained "three acres of land more or less." It is argued from this that the grantor did not intend to convey an exact three acres, and therefore it is apparent that there was no mutuality of mistake. It is quite true, as said in *Commissioners v. Younger*, 29 Cal. 179, that expressions used in such deeds "about so many acres" or "so many acres more or less" are openly indeterminate and uncertain and show that they are not of the essence of the contract, and that reliance, so far as quantity is concerned, is placed not upon them, but upon the description by metes and bounds. But this action is for a reformation because of mistake, a part of which mistake was the use of these very words. We think, without elaboration, that the complaint is sufficiently free from ambiguity to pass demurrer.

There was omitted from the deeds about one-twenty-seventh of an acre. The value of the omitted land, upon the basis of the purchase price, respondent points out is eighty-three dollars, but we cannot agree with respondent that, because these are the facts, equity will treat the omitted land as a minute discrepancy of no material importance. The price or value of omitted lands is, of course, an element in determining whether or not equity will take cognizance of a suit to recover

the omitted portion. (*Backus v. Jeffrey*, 47 Mich. 127, [10 N. W. 138].) But in a suit for land, value is by no means the all-controlling and determinative consideration. The omitted land may be of great importance to the value of plaintiff's remaining land. It may have a peculiar value, *pretium affectionis*, in plaintiff's eyes. Many other considerations may enter into the matter, making it of importance to plaintiffs to recover that which is rightfully theirs.

The demurrer that the cause of action is barred by the statute of limitations is not well taken. The argument upon this point is addressed to the fact that the error was patent upon the deed; that the means of discovery were therefore at hand to plaintiffs, and their failure to discover charges them with laches and brings them within the bar of the statute of limitations. But the contrary view is expressed in *Allen v. Reed*, 51 Cal. 362; *Sheils v. Haley*, 61 Cal. 157; *Breen v. Donnelly*, 74 Cal. 301, [15 Pac. 845]; *Stonesifer v. Kilburn*, 122 Cal. 659, [55 Pac. 587]; *Hart v. Walton*, 9 Cal. App. 502, [99 Pac. 719].

It is therefore ordered that the judgment is reversed and the cause remanded, defendant to be permitted to answer to the merits.

Melvin, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[L. A. No. 3007. Department Two.—February 21, 1913.]

KERN RIVER COMPANY (a Corporation), Appellant, v.
COUNTY OF LOS ANGELES (a Public Corporation),
Respondent.

TAXATION—ASSESSMENT OF FRANCHISE—USE OF HIGHWAYS BY ELECTRIC LINE—TOLLS NOT COLLECTED ALONG ROUTE.—The occupancy by an electric light and power company of certain of the public highways of a county by its transmission line, in pursuance of an ordinance of the county granting it a franchise to construct a line along such highways for the purpose of conducting and distributing electrical energy along said route, is assessable as a franchise, not-

withstanding the company at the time of the assessment was not using the transmission line erected along that route for the purpose of collecting tolls.

ID.—ASSESSMENT OF FRANCHISE IN DIFFERENT SCHOOL DISTRICTS—VALUATION—ABSENCE OF FRAUD.—In the absence of any fraud on the part of the assessor in the valuation of such franchise, the assessments of which in each school district purported to be upon the franchise used in that particular district, the fact that he valued the franchise in each district according to the number of miles of transmission lines in that district, without reference to the extent of the public highways over which the lines were erected, does not render the assessments violative of section 10 of article XIII of the constitution, requiring property to be assessed in the district in which it is situated.

ID.—METHOD OF VALUATION DETERMINABLE BY ASSESSOR.—In the absence of fraud on the part of the assessor, his method of arriving at the valuation of property is a matter committed entirely to his determination.

ID.—APPROVAL OF ASSESSMENT BY BOARD OF EQUALIZATION.—Where such company had appealed to the county board of equalization to correct the alleged inequalities in such assessments, the refusal of the board to reduce the assessments is, in the absence of fraud, conclusive upon the courts.

ID.—INVALID ASSESSMENT—HIGHWAYS OF DISTRICT NOT USED FOR TRANSMISSION LINE—APPROVAL BY BOARD OF EQUALIZATION.—Such franchise could not be assessed against the company in a school district in which no part of the public roads was used in the operation of its lines. Such an attempted assessment thereof is without the jurisdiction of the assessor to make, and cannot be validated, or rendered conclusive, by the action of the county board of equalization in approving it.

APPEAL from a judgment of the Superior Court of Los Angeles County. W. R. Hervey, Judge.

The facts are stated in the opinion of the court.

Gibson, Dunn & Crutcher, and Edward E. Bacon, for Appellant.

J. D. Fredericks, and Hartley Shaw, for Respondent.

MELVIN, J.—Plaintiff sued, with partial success, to recover certain taxes for the fiscal year 1908–9, which had been paid under protest. This appeal is from that part of the judgment which was adverse to plaintiff.

Plaintiff is a corporation engaged in the business of producing electricity for light and power. From its power plant in Kern County it transmits its product over its lines to a transforming station in the city of Los Angeles, where all of its electricity is delivered to another corporation. No local service is given along the course of its transmission lines.

The tax which was paid under protest was levied upon plaintiff's "franchise to use the public highways of the county of Los Angeles." This franchise to use the highways of the county outside of the city of Los Angeles was assessed for the aggregate sum of \$28,960, the total amount being distributed by the assessor among the various school districts through which plaintiff's lines extended in proportion to the mileage in each district, without regard to the actual use of the public highways therein. In Delsur district plaintiff's lines extended entirely over private rights of way and not a foot of any county road was used. In Elizabeth Lake, Castiac, Newhall, and Vinedale the only use of public highways was in crossing, nine public roads being so used for an aggregate distance of three hundred and sixty feet. In four other districts (Morningside, Burbank, West Glendale, and Tropic) more than fourteen miles of the public roads were occupied longitudinally by plaintiff's power line, yet in the districts wherein the roads were merely crossed for an aggregate distance of three hundred and sixty feet the assessment was more than twice as much as in the four wherein fourteen miles of highways were utilized in part for plaintiff's benefit.

Plaintiff presented its objections to the board of equalization, but that tribunal affirmed the assessment.

Appellant's first point is that its occupancy of the highways of Los Angeles County by its transmission lines is not a franchise and not assessable as such. In this behalf it calls attention to the fact that it is merely a manufacturer of electric power which it delivers to a single consumer and that it does not use its transmission lines for the purpose of collecting tolls. Further, it submits that the assessment of its transmission lines in their entirety should be deemed to include whatever rights of way it possessed in the public roads. In support of this position, *Spring Valley Water Works v. Barber*, 99 Cal. 36, [21 L. R. A. 416, 33 Pac. 735],

is cited. There is, however, a difference between that case and this. In that case, the permission granted by the supervisors of Alameda County to lay pipes along the highways of said county did not authorize the water company to sell water in that county and to collect tolls. "It had a mere right of way in common with all other persons, entirely unconnected with any privilege granted by the county to take tolls, collect water rates or enjoy any other special prerogative or advantage." In the case at bar the findings show that in 1896 the board of supervisors of Los Angeles County by ordinance granted a franchise to plaintiff's predecessor to construct a line or lines along certain designated highways of Los Angeles County for the purpose of conducting and distributing electrical energy along said route. The franchise carried with it "the right to collect rates or compensation for the use of electrical energy." It is true that this part of the franchise was not being used at the time of the assessment here attacked and that was a matter proper for the consideration of the board of equalization in fixing the value of plaintiff's privilege for the purposes of taxation. The mere fact that the right to collect rates was not asserted did not make it valueless however. Plaintiff's position as a going company, traversing a rich territory, was of some increased value in keeping out possible competitors in view of the fact that at any time it might have undertaken to supply electricity to the residents along the lines of its transmission system. It possessed an assessable franchise.

Appellant's next contention is that the assessor violated the constitutional mandate of section 10 of article XIII in failing to assess the property in the districts in which it was situated. While we must concede that the method followed by the assessor was, to say the least, unscientific, in that he valued the franchise in each school district according to the number of miles of transmission lines in that district, without reference to the extent of the public highways over which said lines were erected, we find that the assessment in each instance purported to be upon the franchise used in a particular school district. This was a substantial compliance with the requirement of the constitution. In the absence of fraud, mere irregularities in an assessment do not vitiate it. While there were allegations of fraud in the complaint and denials

thereof in the answer, no evidence thereon was introduced and the court made no finding upon the subject. This did not constitute error. (*Kaiser v. Dalto*, 140 Cal. 170, [73 Pac. 828].) In the absence of fraud on the part of the assessor, his method of arriving at the valuation of property is a matter committed entirely to his determination. (*San Jose Gas Co. v. January*, 57 Cal. 614; *Los Angeles v. Western Union Oil Co.*, 161 Cal. 206, [118 Pac. 720].)

Respondent is of the opinion that the case of *Los Angeles Gas & Electric Co. v. County of Los Angeles*, 162 Cal. 165, [121 Pac. 384], is decisive of the problems presented here. In that case, as in this, the public service corporation had appealed to the county board of equalization to correct the alleged inequalities in the assessment of its properties. The board had refused to reduce the assessment and it was held that in the absence of fraud the action of the board of equalization was absolutely binding upon this court. That case is, therefore, conclusive against appellant with reference to the assessments made in school districts where there was property in the nature of "franchises to use the public highways of the county of Los Angeles." But we do not think the action of the board of equalization is conclusive with reference to the assessment of such "franchise" in Delsur school district, wherein not one foot of the public roads was utilized by the plaintiff in the operation of its lines. The action of the board of equalization upon a subject not properly within its jurisdiction is not beyond review. Even a body possessing powers so enormous and in certain instances final jurisdiction, may not validate an assessment upon nonexistent property. Public highways are easements, and when they are enjoyed in part by a public service corporation in a way creating a special privilege, and derogating to that extent from the public servitude, the corporation becomes subject to an assessment for such a franchise as that here sought to be taxed. Where no such use appears within the territory covered by an attempted assessment, obviously there is nothing to assess, and a charge by the assessor would be as much without jurisdiction as his effort to assess property mortgaged to the state, without deduction for the mortgage. In such a case the board of equalization is not the only tribunal to which

the taxpayer may apply for relief. (*Brenner v. Los Angeles*, 160 Cal. 77, [116 Pac. 397].)

That part of the judgment refusing plaintiff's demand for a return of the taxes paid under protest upon the assessment of its "franchise to use the public highways" in that part of Los Angeles County embraced within the territory of Delsur school district is reversed, with instructions to the lower court to enter judgment accordingly. In all other particulars the judgment is affirmed.

Henshaw, J., and Lorigan, J., concurred.

[L. A. No. 3285. Department Two.—February 24, 1913.]

In the Matter of the Estate of HENRY B. GLEASON,
Deceased. LIDA E. CORBIN, Appellant, v. EVA
MILDRED GLEASON, Respondent.

WILL—MENTAL INCOMPETENCY—UNDUE INFLUENCE — EVIDENCE — CONDUCT AND STATEMENTS OF TESTATOR SHORTLY AFTER EXECUTING WILL.—On a contest of a will on the ground of the mental incompetency of the testator and the undue influence of his wife, evidence that about ten or fifteen minutes after the will had been fully executed, the testator returned to the office of the person who had drafted it in an apparently nervous condition and in a state of physical collapse, and of statements then made by him to the effect that matters would have been extremely uncomfortable at his home if the will had not been properly executed, was competent solely upon the issue as to the testator's mental condition, and was incompetent to prove the undue influence, and an instruction so limiting its effect was properly given.

ID.—CONDUCT AND STATEMENTS NOT PART OF RES GESTAE.—The conduct and utterances of the testator on such occasion were not part of the *res gestae* of the execution of the will, so as to render evidence thereof competent on the issue of undue influence, and the mere fact that but a trifling period of time elapsed between the testamentary act and this occurrence, does not render the evidence admissible for such purpose.

ID.—RES GESTAE DEFINED.—The *res gestae* are those circumstances which are the undesigned incidents of particular litigated acts, and are

admissible where illustrative of such acts. These incidents may be separated from the act by lapse of time more or less appreciable. Their sole distinguishing feature is that they should be necessary incidents of the litigated act in the sense that they are part of the immediate preparations for, or emanations from, such acts, and are not produced by the calculated policy of the actors. They must stand in immediate causal relation to the act, a relation not broken by individual wariness seeking to manufacture evidence for itself. Declarations which are the immediate accompaniments of an act, their immediateness being tested by closeness, not of time but by causal relation, are admissible as part of the *res gestae*.

Id.—FACTS CONSTITUTING UNDUE INFLUENCE—EVIDENCE OF—DECLARATIONS OF TESTATOR.—In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such undue influence has been exercised, but also that it has produced an effect upon the mind of the testator, by which the will is not the expression of his own desires. The external facts constituting the exercise of undue influence must be established by other evidence than the declarations of the testator. His declarations are incompetent to show either that the influence was exercised, or that it affected his actions, and are inadmissible, except as they may illustrate his mental state, and give a picture of the condition of his mind contemporaneous with the declarations themselves.

Id.—IMMATERIAL ERROR—INSUFFICIENCY OF EVIDENCE OF UNDUE INFLUENCE.—Even if such subsequent conduct and statements of the testator were properly part of the *res gestae* of the execution of the will, the error of the trial court in refusing to admit the evidence thereof on the issue of undue influence was immaterial, when the other evidence in the case fell far short of establishing that the will was the result of undue influence exerted upon the testator by his wife in such manner as improperly to influence him in the making of the will. In the present case, such other evidence is held insufficient to show that the will was the result of the wife's undue influence.

Id.—UNDUE INFLUENCE MUST OPERATE AT TIME WILL WAS MADE.—A duly executed will cannot be set aside on the ground of undue influence, unless there be proof of a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made.

APPEAL from a judgment of the Superior Court of Los Angeles County admitting a will to probate, and from an order refusing a new trial. Frederick W. Houser, Judge.

The facts are stated in the opinion of the court.

G. P. Adams, J. H. Peters, and Newman Jones, for Appellant.

E. B. Drake, for Respondent.

MELVIN, J.—The will of Henry B. Gleason, deceased, was admitted to probate July 13, 1911. By it he left ten dollars to his sister, Lida E. Corbin, appellant herein, and the rest of his property, amounting in value to about forty thousand dollars, to his wife, Eva Mildred Gleason. Early in July, 1911, the sister of the deceased Gleason filed a contest to said will, praying revocation of the probate thereof on the grounds, among others, that “the said deceased was induced to execute the said will by reason of the undue influence of the said Eva Mildred Gleason, exercised and exerted by her over and upon him, and that the said will was extorted from him by the said Eva Mildred Gleason by threats of personal violence, and was executed by him under fear of the same, and that at the time of the making of the said will and for a long time prior thereto, he was not of sound mind and memory, and was not competent to make a will.” The questions of fact involved were tried before a jury and a determination in favor of the validity of the instrument having been made, judgment was entered accordingly adverse to the prayer of the sister’s petition. From said judgment and from an order denying her motion for a new trial the contestant appeals. The will was drawn by W. S. Lang, a notary public, who had known Mr. Gleason for some years. Testator went alone to the office of Mr. Lang; told the notary that he wanted to make a will; stated his wishes in relation thereto; and the will was prepared by the notary. Mr. Gleason requested that in addition to the signatures of the two witnesses, he desired Mr. Lang to acknowledge the instrument as a notary. This was accordingly done, and that the will was executed with proper formality is not questioned. Of the manner and apparent testamentary competency of Mr. Gleason at the time of the execution of the will, the notary testified:

“At the time he signed the will his condition was apparently normal, or otherwise I would not have taken his acknowledgment. I saw nothing at that time to indicate to my mind at all that he was not perfectly normal and sane.

He told me how to make the will and who to will the property to.

“Q. Who did he tell you to will the property to? A. I remember the wife and sister. He gave his sister \$10, if I remember right. After the will was written I think he read it. I am quite sure he did.

“Q. Was there anything to indicate that he was acting under any undue influence that you noticed at that time? A. No, not that I noticed.

“Q. You would never have taken his acknowledgment as a notary public if there had been, would you? A. Unquestionably I would not.”

Further describing the conduct of the testator, the notary was permitted to testify, over objection, that Mr. Gleason returned to his office within ten or fifteen minutes after the execution of the will; that testator seemed to be in a state of nervous collapse; that he “fell into a rocking chair”; and that a conversation ensued between him and the notary. This may be best described in the language of the record. Witness Lang being questioned by Mr. Adams, testified as follows:

“He sat down in a chair and made the remark: ‘Oh, hell.’ I did not pay any attention to it at that time and continued to read, and again he remarked: ‘Oh, hell, that paper,’ and so I looked up and he was looking at me and I said ‘What paper do you mean?’ ‘That will.’ So I thought I would ask him questions—

“Q. (By Mr. Adams.) You mean he said ‘that will?’ That was his answer, ‘that will.’ I said: ‘I suppose you knew, Mr. Gleason, it was not necessary to acknowledge that at all. That was rather an unusual proceeding.’ ‘I know,’ he said, ‘but I had to do it. I had to do it right or hell would pop at home; I could not stay there.’ And that is about all that was said on that particular point. He frequently says, ‘Oh, hell,’ or ‘damn it.’

“Q. Repeat any further conversation you had with him at that time. A. I asked him—I said: ‘Why, Mr. Gleason, who did you marry?’ He said: ‘I will be damned if I know.’ He said, ‘I got drunk, and they said I was married; that is all I know about it.’ That was about all that was said at that time.”

Another witness named Clemens corroborated Mr. Lang in his account of the testator's nervous condition. In the charge to the jury the court gave the following instruction:

"You are instructed that while there was testimony admitted in this case from the witnesses, William S. Lang and Nicholas Clemens, that shortly after the making of the will in controversy, but after it was signed, witnessed, and delivered, that the decedent appeared to be nervous and in more or less of a physical collapse, and which evidence contained a purported conversation or statement at that time and place by decedent, yet you are now cautioned that such testimony was admitted alone upon the theory, and was competent only for the purpose, of being considered by you upon the question of the soundness or unsoundness of the mind of the testator, the said Henry B. Gleason, and was not competent to prove, nor was it admitted for the purpose of, nor can you consider the same, in any wise as establishing undue influence on the part of Eva Mildred Gleason, and was not competent for that purpose, and you should not consider it for that purpose."

The limitation in the above instruction of the scope of the testimony of the two witnesses is the appellant's sole assignment of error, and her entire reliance for a reversal of the judgment rests upon the contention that the conduct and utterance of the testator were a part of the *res gestae*.

Undoubtedly the rule regarding the matters which are admissible as parts of the *res gestae* has been somewhat liberally construed by courts in later years. It is also true that declarations when admissible as parts of the *res gestae* need not necessarily be absolutely contemporaneous with the main event. Appellant contends that the test is not the time of the declarations with reference to the main event, but the opportunity for reflection and intention which may have been given to the testator, or, as Professor Wigmore expresses it: "The utterance must have been before there has been time to contrive and misrepresent, i. e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance. This limitation is in practice the subject of most of the rulings." (Wigmore on Evidence, par. 1750.) Conceding this to be the general rule, we cannot say that the lapse of from ten to fifteen minutes was not, under the circumstances here given, sufficient to exclude the

evidence as part of the *res gestae* and as applicable to the issue of undue influence. In the first place, such declarations are not looked upon with favor by the courts. Many statements of the rule might be cited, but a typical and oft-quoted one is that of Colt, J., in *Shailer v. Bumstead*, 99 Mass. 119:

“That the instrument which contains the testamentary disposition of a competent person, executed freely and with all requisite legal formalities, must stand as the only evidence of such disposal, is generally conceded. Such a will is not to be controlled in its plain meaning by evidence of verbal statements inconsistent with it; nor impaired in its validity and effect by afterthoughts or changes in the wishes or purposes of the maker, however distinctly asserted. It is to be revoked only by some formal written instrument, some intentional act of destruction or cancellation, or such change of circumstances as amounts in law to a revocation. Any invasion of this rule opens the way to fraud and perjury; promotes controversy; destroys to a greater or less degree that security which should be afforded to the exercise of the power to control the succession to one's property after death.”

The rule with reference to declarations in such cases in this and many other jurisdictions has long been settled and is well expressed in *Kirkpatrick v. Jenkins*, 96 Tenn. 89, [33 S. W. 820]: “We think the great weight of authority and of reason, is to the effect that subsequent declarations of an alleged testator may be considered by a jury upon an issue of mental capacity, but that they cannot be considered upon an issue of undue influence, unless there be independent proof indicating the presence of undue influence, and then only to show a condition of mind susceptible to such influence, and the effect thereof upon the testamentary act.” This court has formulated the rule even more forcibly. *In re Calkins*, 112 Cal. 301, [44 Pac. 578], contains this language in the opinion: “In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such undue influence has been exercised, but also that it has produced an effect upon the mind of the testator, by which the will which he executes is not the expression of his own desires. The external facts constituting the exercise of undue influence must be established by other evidence than the declarations of the testator. His declarations are incompetent

to show either that the influence was exercised, or that it affected his actions, and are inadmissible, except as they may illustrate his mental state, and give a picture of the condition of his mind contemporaneous with the declarations themselves. Whenever the condition of the mind is a fact which it is desirable to prove, it may be established by such evidence as is competent for that purpose. The mental condition of an individual is made manifest to others by his statements, declarations, conversations, as well as by his conduct, and, when the state of a testator's mind at the time of executing the will, is the fact to be shown, his contemporaneous declarations or statements furnish the most satisfactory evidence of that fact. His statement of the effect that an act or suggestion of another produced upon him at some previous time is, however, only hearsay, while the statement of his feeling or disposition at the time of making the statement is but the expression in words of his condition at that time, and, so far as it produces a picture thereof, is admissible." (See, also, *Estate of Ricks*, 160 Cal. 485, [117 Pac. 539]; *Estate of Kilborn*, 162 Cal. 11, [120 Pac. 762]; *Estate of Gregory*, 133 Cal. 131, [65 Pac. 315].) Unless, therefore, we are compelled to regard the utterances and demeanor of the testator as parts of the *res gestae*, evidence relating to them should be declared inadmissible according to a rule most firmly established in this state.

Definitions of *res gestae* are as numerous as prescriptions for the cure of rheumatism and generally about as useful. One accurate definition is quoted with approval in 7 Words and Phrases, 6130, as follows: "The *res gestae* is defined by Wharton in his work on Evidence, 258, 267, 'as those circumstances which are the undesigned incidents of particular litigated acts, and are admissible where illustrative of such acts. These incidents may be separated from the act by lapse of time more or less appreciable. Their sole distinguishing feature is that they should be necessary incidents of the litigated act—necessary in this sense: that they are part of the immediate preparations for, or emanations from, such acts, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act—a relation not broken by individual wariness seeking to manufacture evidence for itself. Therefore declara-

tions which are the immediate accompaniments of an act are admissible as part of the *res gestae*; remembering that immediateness is tested by closeness, not of time but by causal relation, as just explained.' '' Tested by this rule, we cannot say that the conduct and conversation of the testator here reviewed must be considered a part of the *res gestae*. The mere fact that but a trifling period of time elapsed between the testamentary act and the circumstances related by witnesses Lang and Clemens, does not make the evidence admissible for all purposes. It appears from the record that Henry B. Gleason was subject to sick spells, relief from which was obtained only by the use of morphine hypodermically injected. It may well have been that his agitation and his remarks on the occasion of his second visit to the notary's office were caused by illness, or morphine, or a combination of the two. His agitation may have resulted from any one of a dozen causes, and his remarks when analyzed, do not amount even to a statement that his wife had coerced him in the matter of the disposition of his property by will. He described no act or command or threat of his wife; but said he "had to do it right," and expressed the conclusion that matters would have been extremely uncomfortable at home if the instrument had not been properly executed. His statements were not even declarations of past occurrences. That which he said was merely the expression of his opinion regarding a past occurrence, and was no more a part of the *res gestae* because it was uttered a few minutes after the execution of his will, than it would have been if spoken a month later. (*Lissak v. Crocker Estate Co.*, 119 Cal. 444, [51 Pac. 688]; *Durkee v. Central Pacific R. R. Co.*, 69 Cal. 534, [58 Am. Rep. 562, 11 Pac. 130]; *Luman v. Golden A. C. M. Co.*, 140 Cal. 709, [74 Pac. 307]; *Boone v. Oakland Transit Co.*, 139 Cal. 492, [73 Pac. 243]; *Waldeck & Co. v. Pacific Coast S. S. Co.*, 2 Cal. App. 169, [83 Pac. 158].)

But even if the court had erred in refusing to rule that the conduct and statements of the testator subsequent to the preparation and execution of the will constituted parts of the *res gestae*, we would not look upon the error as material, because the evidence in the case fell far short of establishing contestant's allegation that the will was the result of undue influence exerted upon the testator by Eva Mildred Gleason

in such manner as improperly to influence him in the making of his will. The contestant's only material evidence at the trial beyond that which we have discussed was the following, which we quote from the transcript:

"Other evidence was given on behalf of the plaintiff to the effect that the decedent at the time of his marriage to the defendant was sixty years of age; that she at the time was twenty-two years of age; that the decedent's first wife, to whom he was devotedly attached, died less than a year prior to his marriage to the defendant, after a happy married life of more than thirty years with him; that the defendant first married November 23, 1903; her husband was killed April 19, 1904; that she married again September 1, 1904; was divorced from the second husband December 5, 1906; married the decedent June 5, 1907, having known him but six months; that he had numerous sick spells and his only relief at such times was by use of morphine hypodermically injected; that the will in controversy was taken by the defendant a few hours after its execution to Mr. Pennington, one of the witnesses to the said instrument, and she showed it to him and asked him if he had signed it as a witness, and thereafter on the same day she placed it in a safe deposit box at the bank; that the defendant married again a few months after the death of the decedent Gleason, and this latest marriage was thereafter annulled at her instance; that the decedent, Gleason, died June 22, 1910, seven weeks after the execution of the alleged will, and that the estate left by him was and is appraised at about \$40,000, all of which, with the exception of ten dollars bequeathed to his sister, the said Lida E. Corbin, is by the terms of the will in question devised and bequeathed to the said defendant Eva Mildred Gleason."

The court seems to have been very liberal toward contestant in the admission of testimony. This, of course, was proper, in view of the several issues involved, but we fail to see what relevancy the numerous marriages of Eva Mildred Gleason could possibly have to the questions involved in the contest, and this is most emphatically true with reference to the marital ventures of the lady after she became the widow Gleason. Surely her influence over her former spouse, whatever it may have been, had then ceased. While Gleason's marriage to a young woman who had been once widowed and

once divorced might possibly have indicated that he was reckless, it would not necessarily suggest either lack of testamentary capacity or subjection to the will of his new wife. Her early custody of the will and her prompt inquiry regarding its execution might have been important, if there were other evidence that she had sought by threats or subtler means improperly to influence her husband, but there is no such showing beyond the conduct and statements of the testator which we have discussed above, and which were totally inadequate to establish undue influence. The unbroken rule in this state is that the courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of "a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made." (*Estate of Carithers*, 156 Cal. 428, [105 Pac. 130]; *Estate of Lavinburg*, 161 Cal. 543, [119 Pac. 915]; *Estate of Kilborn*, 162 Cal. 11, [120 Pac. 762].)

The judgment and order are affirmed.

Henshaw, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[L. A. No. 3202. Department Two.—February 25, 1913.]

In the Matter of the Estate of NELLIE GLASS, Deceased.
CHARLES F. MILLER et al., Respondents, v. HOW-
ARD L. GLASS et al., Appellants.

WILL—ESTATE OF DECEDENT CANNOT TAKE UNDER WILL.—The estate of a deceased person is not a person or entity which can take under a will.

ID.—BEQUEST TO ESTATE OF PERSON NAMED—CONSTRUCTION.—A bequest of the residue of the property of the testatrix to "father Glass's estate," the person whose estate was indicated being alive at the date of the will but having predeceased the testatrix, cannot be construed as a bequest to such person if alive, and if not, to his legal heirs, or his devisees or legatees as the case may be.

[L. A. No. 3013. Department Two.—February 25, 1913.]

C. V. STORY, Respondent, v. HOWARD GREEN, Appellant.

APPEAL—DISMISSAL—REQUIREMENT AS TO FORM AND ARRANGEMENT OF TRANSCRIPT.—An appeal taken under the alternative method, as provided in sections 953a et seq. of the Code of Civil Procedure, in which the contested points are few and simple, will not be dismissed for the failure of the reporter's transcript to conform to rules 7 and 8 of the supreme court, limiting the size of the paper to be used for that purpose, and requiring a chronological arrangement of the pleadings and proceedings in the transcript.

ID.—ALTERNATIVE METHOD OF APPEAL—PRESENTATION OF TRANSCRIPT TO TRIAL JUDGE FOR APPROVAL—EXTENSION OF TIME FOR SETTLEMENT.—Where the judge who presided at the trial was not a resident of the county in which the action was tried and was not present therein when the notice required by section 953a of the Code of Civil Procedure, was given to the attorneys of the parties informing them that the transcript of the trial was ready for presentation to such judge for his approval, it was a proper method of procedure for such trial judge to indicate a future date when he would be in the county to take up the matter of settling the transcript, and for the presiding judge of the superior court of that county to continue the hearing of the settlement until the day thus indicated.

NEGLIGENCE — PERSONAL INJURIES — EVIDENCE — WEALTH OF DEFENDANT.—In an action to recover the actual damages occasioned the plaintiff for personal injuries received by him from a collision with an automobile negligently driven by the defendant, in which there was neither averment nor testimony tending to establish fraud, oppression, or malice, the plaintiff cannot introduce evidence as to the defendant's wealth. The introduction of evidence upon that subject could only have the effect of prejudicing the rights of the defendant.

ID.—MEASURE OF DAMAGES—ERRONEOUS INSTRUCTION.—The error in admitting such evidence was not cured by a general instruction to the jury in which the proper elements of damage in such a case were enumerated, if the court further specifically instructed them, in the event they found for the plaintiff, that they might in determining the amount of their award, take into consideration the pecuniary condition of the defendant as disclosed by the evidence.

ID.—TESTIMONY BY DEFENDANT RESPECTING HIS PROPERTY—ERROR NOT CURED.—The error in permitting the plaintiff, as part of his case, to question the defendant on the subject of his wealth, was not cured by the fact that the defendant, in opening his own case, took

the stand and gave testimony in his own behalf regarding his property, if such testimony amounted to nothing more than additional cross-examination for the purpose of explaining some of the matters brought out in his examination in chief while he was testifying as plaintiff's witness.

ID.—ERRORS NOT WAIVED BY ABANDONMENT OF APPEAL FROM ORDER REFUSING NEW TRIAL.—Such errors were not waived by the failure of the defendant to perfect his appeal from an order denying his motion for a new trial. They are properly reviewable on an appeal from the judgment.

ID.—REMARKS OF COUNSEL DURING TRIAL—PREJUDICE TO DEFENDANT.—Where one of the counts of the complaint in such action charged that at the time of the accident the defendant was violating a municipal ordinance applicable to the driving of automobiles, and during the trial it appeared that the defendant was a practicing attorney at law, it was improper, and possibly prejudicial, for counsel for the plaintiff to make a remark to the effect that because the defendant was a lawyer, and presumed to know the law, he should be held to a stricter accountability than a layman. The injurious effect of such remark was cured by a statement of the court to the effect that the occupation of the defendant was not a material subject of inquiry.

'APPEAL from a judgment of the Superior Court of Los Angeles County. K. S. Mahon, Judge presiding.

The facts are stated in the opinion of the court.

L. E. Clawson, M. M. Meyers, Howard Green, and E. B. Drake, for Appellant.

Swaffield & Mulholland, for Respondent.

MELVIN, J.—Action for damages for personal injuries received by plaintiff, who, while riding a motorcycle, was struck by an automobile driven by defendant. From a judgment against him for the sum of three thousand dollars, defendant appeals.

Respondent moves the dismissal of the appeal upon the ground that the reporter's transcript does not conform to rules 7 and 8 of this court and that the clerk's transcript was not approved within the time prescribed by law. Although respondent's motion to dismiss the appeal has been heretofore heard and denied, it is proper to say here that his objection

is founded principally upon rule 7 as it was before amendment. The transcript was upon paper within the maximum size allowed by that rule. It is objected that the pleadings, proceedings, and transcript are not chronologically arranged in the transcript as required by rule 8. As the contested points on this appeal are few and simple, this fact causes us no inconvenience, and we do not feel that the ends of justice would be subserved by our refusal to consider the transcript. The appeal was taken under the "alternative method" as provided in sections 953a et seq. of the Code of Civil Procedure. Respondent denies the right of a judge to postpone the presentation of a bill of exceptions beyond the time prescribed by section 953a of the Code of Civil Procedure, but we think the contention is without merit. It was shown at the hearing below by the affidavit of a deputy county clerk (which document by direction of the judge was made a part of the transcript) that the Hon. K. S. Mahon, who had presided at the trial and who is not a resident of Los Angeles County, was not within said county when the notice required by law was given to the attorneys informing them that the transcript was ready for presentation to the judge who had tried the case. The affiant communicated with Judge Mahon, who appointed a day upon which he would be in Los Angeles and would take up the matter. The hearing was regularly continued by orders of the presiding judge of the superior court of Los Angeles County until the day thus indicated. This was the lawful and proper method of procedure.

The plaintiff called the defendant as a witness, and over objection examined him with reference to his wealth. This was a case where only actual damages resulting from negligence were alleged. There was neither averment nor testimony tending to establish fraud, oppression, or malice, and appellant insists that in such a case as this plaintiff may recover, if at all, only such an amount as will fairly and reasonably compensate him for the injuries received and the detriment caused to him as a result of the defendant's negligence. It has long been established that the plaintiff may not in such a case introduce proof of his poverty, because the damages are not in any manner dependent upon his financial condition. (*Shea v. Potrero & Bay View R. R. Co.*, 44 Cal. 429; *Malone v. Hawley*, 46 Cal. 414; *Mahoney v. San Francisco &*

San Mateo Ry. Co., 110 Cal. 471, [42 Pac. 968, 43 Pac. 518]; *Johnston v. Beadle*, 6 Cal. App. 253, [91 Pac. 1011].) The rule, it seems to us, is equally applicable to the defendant. A man's responsibility for his negligence does not depend, in the slightest degree, upon his wealth, and the introduction of evidence upon that subject could only have the effect of prejudicing the rights of the defendant. In *Fox v. Oakland Consolidated St. Ry. Co.*, 118 Cal. 66, [62 Am. St. Rep. 216, 50 Pac. 28], this court, quoting from *Mayhew v. Burns*, 103 Ind. 340, [2 N. E. 793], said: "We can discover no principle upon which it can be determined whether negligence can be attributed to one in a given case by an inquiry into the state of his fortune." It is true that in the case under review, the matter in issue was not the wealth or property of the defendant, but the court was considering the subject of the plaintiff's alleged contributing negligence. But the principle announced is thoroughly applicable to this case. The very rule for which appellant contends was announced in the instructive case of *Barbour County v. Horn*, 48 Ala. 578, an action against a county by one who had been injured by a fall from a defective bridge. After enumerating the elements of damage which may be considered in a case in which no malice, fraud, oppression, nor gross negligence are pleaded, the court said: "But the wealth of the defendant or poverty of the plaintiff has nothing to do with their ascertainment. It was, therefore, improper to admit evidence of the wealth of the defendant in the court below to go to the jury, or to refuse to instruct the jury, when properly requested, that the defendant's wealth could not be taken into consideration in making up their verdict." In 2 Greenleaf on Evidence, (16th ed.), section 269, the rule is phrased as follows: "Nor are damages to be assessed merely according to the defendant's *ability to pay*; for whether the payment of the amount due to the plaintiff, as compensation for the injury, will or will not be convenient to the defendant, does not at all affect the question as to the extent of the injury done, which is the only question to be determined. The jury are to inquire, not what the defendant can pay, but what the plaintiff ought to receive." The same rule is announced in *Roach v. Caldbeck*, 64 Vt. 596, [24 Atl. 989]. But respondent says that the instructions cured any possible error in the admission of evi-

dence regarding the defendant's wealth, calling our attention to a general instruction by which the proper elements of damage in a case like this were enumerated. This general instruction could not have served to cure the error because the court instructed the jury as follows:

"You are instructed that in determining the amount of damage, if any, to be awarded to the plaintiff, you have a right to take into consideration the pecuniary condition of the defendant as disclosed by a preponderance of the evidence in this case."

That this instruction was erroneous and that in its tendency it was injurious to defendant can scarcely be doubted.

When defendant opened his case he took the stand and gave testimony in his own behalf regarding his property, and this, according to respondent, was a waiver of the errors discussed above. In support of his position he cites a number of cases, including two Californian authorities—*People v. Anderson*, 26 Cal. 132, and *McLeod v. Barnum*, 131 Cal. 608, [63 Pac. 924], neither of which is in point. One was a case in which a defendant waived the error committed by the court in placing his wife on the stand without his consent, as a witness against him, by calling her in his own behalf. In the other case, after one witness had testified without objection to the contents of a letter, another gave testimony upon the same subject without preliminary proof of the loss of the written instrument. The court held that the evidence was immaterial but if it has been the admission of the testimony without any objection was a waiver of the error. In this case the examination of the defendant in his own behalf amounted to nothing more than additional cross-examination for the purpose of explaining some of the matters brought out in his examination in chief while he was testifying as plaintiff's witness. The testimony quoted in respondent's brief, which was given by defendant in his own behalf, was directed not to the *amount* of his property, but to the *character* of his interest therein. This was practically but a continuation of his cross-examination.

There is no merit in the contention that the errors discussed above were waived by the failure of appellant to perfect his appeal from the order denying his motion for a new trial. They are properly reviewable in an appeal from the judgment.

During the cross-examination of the defendant he was asked by a juror if he were a practicing lawyer, and having stated his occupation to be that of an attorney at law he was asked further questions about his practice. The court, interrupting the cross-examination, said: "You do not hold that because he is a lawyer he is held to be more accountable than anybody else." To this remark counsel replied: "Yes, I claim it is a natural presumption that a lawyer is presumed to know more of the law than an ordinary layman." Inasmuch as one of the counts of the complaint charged that at the time of the accident the defendant was violating a municipal ordinance this remark might have been prejudicial to him, because naturally a lawyer is no more charged with knowledge of the ordinances of a great city like Los Angeles applicable to automobiles than is any other person who acts as a driver of such a vehicle. But the remark of the court immediately following counsel's statement was probably sufficient to overcome any injury which might have resulted from an erroneous and uncontradicted declaration of the law. The court said: "He is not on trial for his knowledge of the law." The two statements of the court quoted above must have apprised the jurors of the true rule that the occupation of the defendant was not a material subject of inquiry. As the case must be reversed for other reasons it is not necessary to discuss this matter further. As counsel for respondent admits that his statement (which we have quoted) was "one which would have been much better unsaid" there will doubtless be no repetition of it at another trial.

The judgment is reversed.

Henshaw, J., and Lorigan, J., concurred.

MEMORANDUM CASES.

[L. A. No. 2955. Department One.—December 23, 1912.]

A. M. VICKREY et al., Appellants, v. SIMON MAIER and
JOHN T. JONES, Respondents.

Judgment reversed on the authority of *Vickrey v. Maier, ante*, p. 384.

APPEAL from a judgment of the Superior Court of
Los Angeles County. Charles Monroe, Judge.

The facts are stated in the opinion of the court.

Alton M. Cates, and Stewart & Stewart, for Appellants.

James P. Clark, and Mott & Dillon, for Respondents.

SHAW, J.—The facts in this case are in all essential particulars the same in effect as in the second contract considered in the case of *Vickrey v. Maier, ante*, p. 384, [129 Pac. 273], this day decided. The parties to this appeal have stipulated that the decision of the appeal in that case shall control the decision here. Upon the reasons stated in the opinion in that case it is obvious that the judgment of the court below in this case for the defendants was erroneous.

The judgment is reversed.

Angellotti, J., and Sloss, J., concurred.

[S. F. No. 5834. In Bank.—January 9, 1913.]

**E. E. NICHOLS, Appellant, v. BOULEVARD GARDENS
LAND COMPANY (a Corporation), Respondent.**

CORPORATION—REPURCHASE OF STOCK.—Judgment reversed on the authority of *Schulte v. Boulevard Gardens Land Company, ante, p. 464.*

APPEAL from a judgment of the Superior Court of Alameda County. John Ellsworth, Judge.

The facts are similar to those stated in the opinion in *Schulte v. Boulevard Gardens Land Company, ante, p. 464.*

J. A. Elston, and George Clark, for Appellant.

Keyes & Martin, and Leon E. Martin, for Respondent.

THE COURT.—This cause presents precisely the same questions as those considered in the opinion in *Schulte v. Boulevard Gardens Land Company, ante, p. 464, [129 Pac. 582]*, filed this day. Upon the authority of that decision, the judgment herein is reversed.

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ACCOUNTING.

BREACH OF COVENANT TO PAY MORTGAGE DEBT FROM NET INCOME OF RANCH—PLEADING—PRAYER FOR GENERAL RELIEF—EVIDENCE OF GROSS INCOME—ERRONEOUS NONSUIT.—In an action to recover for the breach of a covenant in an agreement between parties who occupied confidential relations, by the terms of which the defendant promised to pay the net income from a ranch in which the plaintiffs had an interest to the reduction of a mortgaged indebtedness thereon, where the complaint prayed for judgment in a specified sum alleged to be the amount of the net income, and also for general relief, it was error to grant a nonsuit merely because the evidence offered by the plaintiffs showed the receipt of gross income without showing the net income realized. Such evidence, under the prayer for general relief, entitled the plaintiffs to an accounting of the receipts and disbursements of the ranch, and an interlocutory judgment directing such accounting would have been proper. The accounting might have been ordered through a reference, or the court might, with or without a preliminary interlocutory order, have proceeded to take and state the account itself, rendering such final judgment thereon as might appear to be proper. (Fox v. Hall, 287.)

ADOPTION.

1. **ESTATE OF DECEASED PERSONS—SUCCESSION TO SEPARATE PROPERTY OF INTESTATE—SOURCE OF PROPERTY IMMATERIAL.**—The statute of succession in this state, in providing for the disposition of the separate property of one dying intestate, makes no distinctions based upon the channel through which the property may have come to the decedent. (Estate of Jobson, 312.)
2. **RIGHT OF INHERITANCE—STATUTORY REGULATIONS.**—The right of inheritance, and also the subject of adoption and the rights and obligations springing therefrom, are purely matters of statutory regulations. (Id.)
3. **EFFECT OF ADOPTION—NATURAL RELATION SUPERSEDED.**—The effect of an adoption under the Civil Code is to establish the legal relation of parent and child, with all the incidents and consequences of that relation, between the adopting parent and the adopted child. This necessarily implies that the natural relationship between the child and its parents by blood is superseded. (Id.)

ADOPTION (Continued).

4. **RIGHT OF SUCCESSION BY ADOPTING PARENT—EXCLUSION OF NATURAL PARENT.**—As the act of adoption confers upon the adopted child the right to succeed to the estate of the adopting parent in like manner as a child of the blood, it follows that, upon the death of the child, the adopting parent is entitled to inherit as a parent, to the exclusion of the parent by blood. (Id.)
5. **DEATH OF ADOPTING PARENT—NATURAL RELATION NOT REVIVED.**—The relation of parent and child, which existed between the parent by blood and the child prior to the adoption and which was supplanted by the new relation thereby created, is not revived by the death of the adopting parent prior to the death of the child. (Id.)
6. **DEATH OF CHILD AFTER DEATH OF ADOPTING PARENT—NATURAL PARENTS DO NOT SUCCEED TO ESTATE.**—Upon the death intestate of the adopted child after the death of the adopting parent, the parents by blood have no right of inheritance as parents to the child's estate. (Id.)

ADVERSE POSSESSION.

1. **COLOR OF TITLE—KNOWLEDGE OF DEFECT IN TITLE.**—The fact that an adverse possessor of land believed that he owned the property and recognized no other title is sufficient to establish the good faith necessary to gain title where the adverse possession is under color of title. The mere knowledge of a defect in the title is not sufficient to destroy the adverse character of the possession. (Montgomery & Mullen Lumber Company v. Quimby, 250.)
2. **CONTINUITY OF ADVERSE POSSESSION—TOWN LOT—VACANCY DURING INTERVALS BETWEEN TENANCIES.**—It is not essential, in every case, to the continuity of an adverse possession under color of title, that there shall be a continuous personal presence on the land by some person holding for the adverse claimant; and where the property adversely claimed is a town lot, on which buildings had been erected by the claimant, and which when its own use ceased, it let to tenants, the fact that the property remained vacant during intervals between tenancies, did not destroy the continuity of the adverse possession, in the absence of any intrusion thereon by other persons. (Id.)
3. **OFFER TO BUY OUTSTANDING TITLE AFTER TITLE HAD BEEN ACQUIRED BY ADVERSE POSSESSION.**—The mere offer of the adverse claimant, after his adverse possession had continued for a sufficient length of time to give title, to buy in the claim of the holder of the record title in order to clear his own, was not such an acknowledgment of the outstanding title as operated to break the continuity of the adverse possession. (Id.)

AGENCY.

- 1. SALE—PURCHASE BY AGENT HAVING OSTENSIBLE AUTHORITY—EVIDENCE.**—In an action to recover the purchase price of fruit alleged to have been bought by the defendant acting through its agent, and which the defendant claimed to have received merely on consignment to be sold for the benefit of the consignors, the evidence is held sufficient to support the finding of the jury of an actual sale to the defendant, and that the defendant, by want of ordinary care, had allowed its agent to appear to the sellers as having the authority to enter into the contracts of sale on its behalf. (*Leavens v. Pinkham & McKevitt*, 242.)
- 2. AUTHORITY OF GENERAL MANAGER OF BUSINESS—BUYING OF FRUIT.** Where an agent is by his principal put in charge of a business in a certain locality as the manager thereof, he is clothed with apparent authority to do all things that are essential to the ordinary conduct of the business at that place. If the business consists in large part of the buying of fruit, he is apparently clothed with authority to buy for his principal. Such acts are within the apparent scope of his employment, and third persons acting in good faith and without notice of or reasons to suspect any limitations on his authority, are entitled to rely on such appearances. (*Id.*)
- 3. ACTUAL AUTHORITY TO BUY—SECRET LIMITATION AS TO PRICE—BONA FIDE SELLER.**—Where a general agent has actual authority to buy, a secret limitation as to the price he is authorized to pay is not binding on a third person who has acted in good faith, relying upon his apparent general authority, provided he has exercised reasonable prudence, and the terms and price fixed are not so unusual or unreasonable as to fairly put a prudent man on his guard. (*Id.*)
- 4. STATUTE OF FRAUDS—ACCEPTANCE BY AGENT.**—The acceptance of goods purchased under a verbal contract of sale, by an agent having authority to make the purchase, is a sufficient acceptance by the principal to obviate any objection based on the statute of frauds. (*Id.*)

See *Brokers; Corporations*, 6, 13–17; *Landlord and Tenant; Mechanics' Liens*, 12; *Pledge*, 3, 4; *Mortgage*, 5.

APPEAL.

- 1. APPEAL FROM JUDGMENT ON JUDGMENT-ROLL—EVIDENCE NOT REVIEWABLE—SUPPORT OF FINDINGS.**—On an appeal from the judgment on the judgment-roll alone, the evidence is not reviewable, and its sufficiency to support findings adverse to a plea of the statute of limitations cannot be questioned. (*Archer v. Harvey*, 274.)
- 2. DENIAL OF NONSUIT—REFUSAL TO STRIKE OUT TESTIMONY—NONAPPEALABLE ORDER.**—No appeal lies from an order denying a motion for a nonsuit or from rulings made during the course of

MEMORANDUM CASES.

[L. A. No. 2955. Department One.—December 23, 1912.]

A. M. VICKREY et al., Appellants, v. SIMON MAIER and
JOHN T. JONES, Respondents.

Judgment reversed on the authority of *Vickrey v. Maier*, ante, p. 384.

APPEAL from a judgment of the Superior Court of
Los Angeles County. Charles Monroe, Judge.

The facts are stated in the opinion of the court.

Alton M. Cates, and Stewart & Stewart, for Appellants.

James P. Clark, and Mott & Dillon, for Respondents.

SHAW, J.—The facts in this case are in all essential particulars the same in effect as in the second contract considered in the case of *Vickrey v. Maier*, ante, p. 384, [129 Pac. 273], this day decided. The parties to this appeal have stipulated that the decision of the appeal in that case shall control the decision here. Upon the reasons stated in the opinion in that case it is obvious that the judgment of the court below in this case for the defendants was erroneous.

The judgment is reversed.

Angellotti, J., and Sloss, J., concurred.

[S. F. No. 5834. In Bank.—January 9, 1913.]

E. E. NICHOLS, Appellant, v. **BOULEVARD GARDENS LAND COMPANY** (a Corporation), Respondent.

CORPORATION—REPURCHASE OF STOCK.—Judgment reversed on the authority of *Schulte v. Boulevard Gardens Land Company, ante*, p. 464.

APPEAL from a judgment of the Superior Court of Alameda County. John Ellsworth, Judge.

The facts are similar to those stated in the opinion in *Schulte v. Boulevard Gardens Land Company, ante*, p. 464.

J. A. Elston, and George Clark, for Appellant.

Keyes & Martin, and Leon E. Martin, for Respondent.

THE COURT.—This cause presents precisely the same questions as those considered in the opinion in *Schulte v. Boulevard Gardens Land Company, ante*, p. 464, [129 Pac. 582], filed this day. Upon the authority of that decision, the judgment herein is reversed.

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ACCOUNTING.

BREACH OF COVENANT TO PAY MORTGAGE DEBT FROM NET INCOME OF RANCH—PLEADING—PRAYER FOR GENERAL RELIEF—EVIDENCE OF GROSS INCOME—ERRONEOUS NONSUIT.—In an action to recover for the breach of a covenant in an agreement between parties who occupied confidential relations, by the terms of which the defendant promised to pay the net income from a ranch in which the plaintiffs had an interest to the reduction of a mortgaged indebtedness thereon, where the complaint prayed for judgment in a specified sum alleged to be the amount of the net income, and also for general relief, it was error to grant a nonsuit merely because the evidence offered by the plaintiffs showed the receipt of gross income without showing the net income realized. Such evidence, under the prayer for general relief, entitled the plaintiffs to an accounting of the receipts and disbursements of the ranch, and an interlocutory judgment directing such accounting would have been proper. The accounting might have been ordered through a reference, or the court might, with or without a preliminary interlocutory order, have proceeded to take and state the account itself, rendering such final judgment thereon as might appear to be proper. (Fox v. Hall, 287.)

ADOPTION.

1. **ESTATE OF DECEASED PERSONS—SUCCESSION TO SEPARATE PROPERTY OF INTESTATE—SOURCE OF PROPERTY IMMATERIAL.**—The statute of succession in this state, in providing for the disposition of the separate property of one dying intestate, makes no distinctions based upon the channel through which the property may have come to the decedent. (Estate of Jobson, 312.)
2. **RIGHT OF INHERITANCE—STATUTORY REGULATIONS.**—The right of inheritance, and also the subject of adoption and the rights and obligations springing therefrom, are purely matters of statutory regulations. (Id.)
3. **EFFECT OF ADOPTION—NATURAL RELATION SUPERSEDED.**—The effect of an adoption under the Civil Code is to establish the legal relation of parent and child, with all the incidents and consequences of that relation, between the adopting parent and the adopted child. This necessarily implies that the natural relationship between the child and its parents by blood is superseded. (Id.)

ADOPTION (Continued).

4. **RIGHT OF SUCCESSION BY ADOPTING PARENT—EXCLUSION OF NATURAL PARENT.**—As the act of adoption confers upon the adopted child the right to succeed to the estate of the adopting parent in like manner as a child of the blood, it follows that, upon the death of the child, the adopting parent is entitled to inherit as a parent, to the exclusion of the parent by blood. (Id.)
5. **DEATH OF ADOPTING PARENT—NATURAL RELATION NOT REVIVED.**—The relation of parent and child, which existed between the parent by blood and the child prior to the adoption and which was supplanted by the new relation thereby created, is not revived by the death of the adopting parent prior to the death of the child. (Id.)
6. **DEATH OF CHILD AFTER DEATH OF ADOPTING PARENT—NATURAL PARENTS DO NOT SUCCEED TO ESTATE.**—Upon the death intestate of the adopted child after the death of the adopting parent, the parents by blood have no right of inheritance as parents to the child's estate. (Id.)

ADVERSE POSSESSION.

1. **COLOR OF TITLE—KNOWLEDGE OF DEFECT IN TITLE.**—The fact that an adverse possessor of land believed that he owned the property and recognized no other title is sufficient to establish the good faith necessary to gain title where the adverse possession is under color of title. The mere knowledge of a defect in the title is not sufficient to destroy the adverse character of the possession. (Montgomery & Mullen Lumber Company v. Quimby, 250.)
2. **CONTINUITY OF ADVERSE POSSESSION—TOWN LOT—VACANCY DURING INTERVALS BETWEEN TENANCIES.**—It is not essential, in every case, to the continuity of an adverse possession under color of title, that there shall be a continuous personal presence on the land by some person holding for the adverse claimant; and where the property adversely claimed is a town lot, on which buildings had been erected by the claimant, and which when its own use ceased, it let to tenants, the fact that the property remained vacant during intervals between tenancies, did not destroy the continuity of the adverse possession, in the absence of any intrusion thereon by other persons. (Id.)
3. **OFFER TO BUY OUTSTANDING TITLE AFTER TITLE HAD BEEN ACQUIRED BY ADVERSE POSSESSION.**—The mere offer of the adverse claimant, after his adverse possession had continued for a sufficient length of time to give title, to buy in the claim of the holder of the record title in order to clear his own, was not such an acknowledgment of the outstanding title as operated to break the continuity of the adverse possession. (Id.)

AGENCY.

1. SALE—PURCHASE BY AGENT HAVING OSTENSIBLE AUTHORITY—EVIDENCE.—In an action to recover the purchase price of fruit alleged to have been bought by the defendant acting through its agent, and which the defendant claimed to have received merely on consignment to be sold for the benefit of the consignors, the evidence is held sufficient to support the finding of the jury of an actual sale to the defendant, and that the defendant, by want of ordinary care, had allowed its agent to appear to the sellers as having the authority to enter into the contracts of sale on its behalf. (*Leavens v. Pinkham & McKevitt*, 242.)

2. AUTHORITY OF GENERAL MANAGER OF BUSINESS—BUYING OF FRUIT. Where an agent is by his principal put in charge of a business in a certain locality as the manager thereof, he is clothed with apparent authority to do all things that are essential to the ordinary conduct of the business at that place. If the business consists in large part of the buying of fruit, he is apparently clothed with authority to buy for his principal. Such acts are within the apparent scope of his employment, and third persons acting in good faith and without notice of or reasons to suspect any limitations on his authority, are entitled to rely on such appearances. (*Id.*)

3. ACTUAL AUTHORITY TO BUY—SECRET LIMITATION AS TO PRICE—BONA FIDE SELLER.—Where a general agent has actual authority to buy, a secret limitation as to the price he is authorized to pay is not binding on a third person who has acted in good faith, relying upon his apparent general authority, provided he has exercised reasonable prudence, and the terms and price fixed are not so unusual or unreasonable as to fairly put a prudent man on his guard. (*Id.*)

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See *Brokers; Corporations*, 6, 13–17; *Landlord and Tenant; Mechanics' Liens*, 12; *Pledge*, 3, 4; *Mortgage*, 5.

APPEAL.

1. APPEAL FROM JUDGMENT ON JUDGMENT-ROLL—EVIDENCE NOT REVIEWABLE—SUPPORT OF FINDINGS.—On an appeal from the judgment on the judgment-roll alone, the evidence is not reviewable, and its sufficiency to support findings adverse to a plea of the statute of limitations cannot be questioned. (*Archer v. Harvey*, 274.)

2. DENIAL OF NONSUIT—REFUSAL TO STRIKE OUT TESTIMONY—NONAPPEALABLE ORDER.—No appeal lies from an order denying a motion for a nonsuit or from rulings made during the course of

APPEAL (Continued).

the trial refusing to strike out testimony. The action of the court in such matters may be reviewed on an appeal from the judgment, if properly presented by the record. (*Leavens v. Pinkham & McKevitt*, 242.)

3. **ORDER DENYING NONSUIT.**—An order denying a motion for a nonsuit is not an appealable order but may be reviewed on an appeal from the judgment. (*Fraser v. Sheldon*, 165.)
4. **APPEAL FROM JUDGMENT BY NEW METHOD—TIME FOR TAKING—FAILURE TO SERVE NOTICE OF ENTRY OF JUDGMENT.**—An appeal from a judgment perfected under the provisions of section 941b of the Code of Civil Procedure is duly taken, when the notice of appeal was filed within six months after the date of entry of the judgment, but not within sixty days after said date, if no notice of the entry of the judgment had been served on the appellants more than sixty days prior to the filing of the notice of appeal. If the record on appeal does not show that any notice of entry of judgment was served on the appellants, it must be assumed, in the absence of a showing to the contrary, that no such notice was served. (*Id.*)
5. **REVIEW OF EVIDENCE.**—Upon an appeal so perfected any question may be reviewed, including the claim that the evidence does not sustain the findings, which could be reviewed upon an appeal taken pursuant to the provisions of section 939 of the Code of Civil Procedure, within sixty days of the rendition of the judgment. (*Id.*)
6. **DISMISSAL — REQUIREMENT AS TO FORM AND ARRANGEMENT OF TRANSCRIPT.**—An appeal taken under the alternative method, as provided in sections 953a et seq. of the Code of Civil Procedure, in which the contested points are few and simple, will not be dismissed for the failure of the reporter's transcript to conform to rules 7 and 8 of the supreme court, limiting the size of the paper to be used for that purpose, and requiring a chronological arrangement of the pleadings and proceedings in the transcript. (*Story v. Green*, 768.)
7. **ALTERNATIVE METHOD OF APPEAL—PRESENTATION OF TRANSCRIPT TO TRIAL JUDGE FOR APPROVAL—EXTENSION OF TIME FOR SETTLEMENT.**—Where the judge who presided at the trial was not a resident of the county in which the action was tried and was not present therein when the notice required by section 953a of the Code of Civil Procedure, was given to the attorneys of the parties informing them that the transcript of the trial was ready for presentation to such judge for his approval, it was a proper method of procedure for such trial judge to indicate a future date when he would be in the county to take up the matter of settling the transcript, and for the presiding judge of the superior court of that county to continue the hearing of the settlement until the day thus indicated. (*Id.*)

APPEAL (Continued).

8. NOTICE OF APPEAL—NOTICE TO CLERK TO PREPARE TRANSCRIPT.—

The notice to the clerk requesting the preparation of a transcript on appeal, being the notice provided for by section 953a of the Code of Civil Procedure, given in the form there prescribed and without other appropriate words, is not a good notice of appeal. (*Marcucci v. Vowinckel*, 693.)

9. ERRONEOUS CONCLUSIONS OF LAW—DIRECTION TO ENTER PROPER JUDGMENT UPON FINDINGS—UNATTACKED FINDINGS SHOWN ERRONEOUS IN DIFFERENT APPEAL.—Ordinarily where an appeal presents a case where the findings are unattacked and are sufficient to support a judgment in favor of the appellant, but the conclusions of law are erroneously drawn from the findings, the appellate court will reverse the judgment, with directions to the lower court to enter a correct judgment upon the findings. It will refuse, however, to do so, in any case where such a direction would be to countenance a grave injustice, and refuses to do so in the appeal in question, as it is shown, by another appeal in the same case, that a controlling finding is unsupported by the evidence. (*Alden v. Mayfield*, 6.)

See *Creditor's Bill*, 8, 9; *District Court of Appeal*; *Estates of Deceased Persons*, 3, 4; *Evidence*, 1; *Justice's Court*, 1, 2; *New Trial*, 2-4; *Place of Trial*, 6; *Practice*, 2, 4; *Receiver*, 5, 8; *Rescission*, 1; *Statute of Limitations*, 6.

ASSAULT. See *Criminal Law*, 1, 7.

ASSIGNMENT.

1. PARTITION—PROCEEDS OF SALE—FUND IN HANDS OF REFEREE—RIGHT

TO SHARE A CHOSE IN ACTION.—A referee in a partition suit, is not, as to the proceeds of the sale of lands involved in the action, a mere bailee of a special fund or the custodian of earmarked money belonging to the co-owners of the land. He is the custodian of funds held by him for the use of the co-owners according to their interests, to be paid when the precise amounts due should be determined. The only appropriate action which one of such co-owners or his agents, could maintain against the referee, or his successor, for the recovery of his share of the money when due, would be either an action of debt or for money had and received to the use of the plaintiff in the action. The claim for such money is a pure chose in action. (*Widenmann v. Weniger*, 667.)

2. ASSIGNMENT OF FUND—RIGHT OF PRIORITY—PURCHASER AT EXECUTION SALE.—

As between successive assignees in good faith and for value of such chose in action, the mere fact that the second assignee acquired title as a purchaser at an execution sale against the co-owner originally entitled to the share of the fund, does not of itself entitle him to priority over a prior assignee who took by an assignment directly from such co-owner. (*Id.*)

ASSIGNMENT (Continued).

3. **NOTICE TO REFEREES OF ASSIGNMENT—PRIORITY OVER SUBSEQUENT PURCHASER AT EXECUTION SALE.**—A prior assignee for value of such chose in action, who immediately gave notice of the assignment to the referees in partition, is entitled to priority over a subsequent purchaser at an execution sale against the assignor, who purchased without any notice of the prior assignment. (Id.)
4. **DUTY OF ASSIGNEE TO GIVE NOTICE TO DEBTOR.**—An assignee of a chose in action must do everything toward having possession that the subject admits, and as between successive assignees thereof, he will have the preference who first gives notice to the debtor, even if he be a subsequent assignee, provided at the time of taking it he had no notice of the prior assignment. (Id.)
5. **TRANSFER OF FUND BY REFEREE—TRANSFEREE LIABLE TO PAY TO PERSONS ENTITLED—NOTICE OF ASSIGNMENT TO CUSTODIAN OF FUND.**—The fact that subsequent to the reception of the notice of the first assignment by the referees in partition, and after the court had made its decree confirming the partition sale, and directing the referees to pay a specific part of the fund to the assignor, they transferred the fund to the custody of the clerk of the court, who in turn transferred it to the county treasurer, there being no order of court for such transfers, and that the fund was in possession of the treasurer at the time of the execution sale to the second assignee, did not change the rights and priorities of the respective assignees. The prior assignee was not required to give a new notice of his assignment to the treasurer, in order to preserve his right of priority as against a possible subsequent assignee of his assignor, and the treasurer, in accepting the fund as a mere volunteer, with knowledge of its source and character, and of the duty of its possessor to pay it over to the persons entitled, charged himself with the obligation to pay it to such persons. (Id.)
6. **FAILURE TO GIVE NEW NOTICE—LACHES—ESTOPPEL.**—Even if it be conceded that a new notice should have been given by the first assignee upon information of the transfer of the fund, he was not guilty of laches nor estopped to dispute the legality of a payment by the treasurer to the purchaser at the execution sale, if he notified the treasurer of the fact of his prior assignment and presented his claim before the treasurer made such payment. (Id.)
7. **EX PARTE ORDER OF COURT IN PARTITION SUIT FOR PAYMENT OF FUND—CUSTODIAN NOT PROTECTED IN PAYMENT TO PERSON NOT ENTITLED.**—Where such fund was not paid into court in the partition suit, and the action was not continued for its disposition, as provided in section 774 of the Code of Civil Procedure, the court in that suit, after its order confirming the sale and directing the distribution of the proceeds by the referees had become final, had no authority to do anything further except to settle the accounts of the referees after they had made the payments as previously di-

ASSIGNMENT (Continued).

rected; and its subsequent order therein, made in a proceeding instituted by the execution purchaser against the treasurer, to which the prior assignee was not a party and of which he had no notice, directing the treasurer to make payment of the share of the fund to the execution purchaser, was insufficient to protect the treasurer in making such payment. (Id.)

8. **DEMAND ON CUSTODIAN—SHOWING OF FUTILITY OF DEMAND.**—A demand by the prior assignee on the treasurer was not a condition precedent to an action to recover of him the chose in action assigned, where it is manifest, from the fact that the complaint in said action was served prior to the payment to the execution purchaser, that the demand would have been refused. (Id.)
9. **EQUITABLE ASSIGNMENT—PROMISSORY NOTES TAKEN FOR PART OF DEBT OF CORPORATION—INDORSEMENT OF NOTES—INDORSEE BECOMES ASSIGNEE PRO TANTO OF ORIGINAL DEBT—INVALIDITY OF NOTES.**—Where a *bona fide* creditor of a corporation takes from it promissory notes evidencing a part of its debt to him, in the belief of the validity of the notes, and passes them on in due course of business to his creditor, the notes being given to and received by the indorsee in payment of the indorser's indebtedness to the indorsee, the assignments of the notes operated as a *pro tanto* equitable assignment of the original indebtedness, notwithstanding the notes themselves were invalid as corporate obligations, and no acceptance of the assignment was made by the corporation. (Goldman v. Murray, 419.)
10. **FORM OF EQUITABLE ASSIGNMENT.**—In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. If from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place. (Id.)

See Estates of Deceased Persons, 5, 7; Lease, 2-6; Mechanics' Liens, 14, 15; Vendor and Vendee, 10, 11.

BOARD OF EQUALIZATION. See Taxation, 10-12.

BONA FIDE PURCHASER. See Promissory Note.

BONDS. See School District; Taxation, 6-8.

BOUNDARY.

1. **BOUNDARIES—AGREED LINE—UNCERTAINTY AS TO TRUE BOUNDARY.**—The doctrine of an agreed boundary line and its binding effect upon the conterminous owners rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line. When that uncertainty exists, or is believed by them to exist, they may amongst themselves by agreement, fix the boundary line, and that agreement will bind all the consenting parties. (Clapp v. Churchill, 741.)

BOUNDARY (Continued).

2. **ACQUIESCENCE IN LINE—UNCERTAINTY AS TO TRUE LINE ESSENTIAL TO AGREEMENT FIXING DIFFERENT LINE.**—Acquiescence is merely evidence of the agreement and can properly be considered as evidence of an agreement only when a formal agreement would itself have made a binding contract. But a formal agreement to fix the boundary line is not valid, indeed is void, if the parties know, or one of them knows, that the agreed line is not the true line, or, in other words, if there be not an actual or believed uncertainty as to the true line. This is so because title to real property can be transferred only by descent, devise, conveyance *inter vivos*, or by adverse holding, and to allow parties where their common boundary line is not uncertain or in dispute by a mere agreement to give one title which belongs in another would be the recognition of a mode of transferring title not countenanced by law. (Id.)
3. **ESTOPPEL TO QUESTION LINE FIXED BY AGREEMENT.**—When such an agreement has been deliberately entered into it is not the theory of the law that there has been a conveyance of any land from the one conterminous owner to the other, but it is that they have agreed between themselves as to the land which they respectively own under circumstances which estop either of them thereafter from denying it. (Id.)
4. **INFERENCES ARISING FROM ACQUIESCENCE—INFERENCES OF UNCERTAINTY DISPROVED BY EVIDENCE TO CONTRARY.**—The inference of an agreement arising from acquiescence may support the added inference that the inferred agreement was based on a questioned boundary. The primary inference is of a valid pre-existing agreement, and to be valid that agreement must have been based on a doubtful boundary line. This inference of a doubtful boundary will not prevail against the proved fact to the contrary, that there was no question or doubt or dispute between both parties over the boundary. (Id.)
5. **ACTION TO DETERMINE BOUNDARY—INSUFFICIENT EVIDENCE OF UNCERTAINTY.**—In an action to determine the common boundary line between the lands of conterminous owners, in which the plaintiffs sought to establish a line different from that called for in their deeds, under an agreement between such owners so fixing it, the evidence is held insufficient to show any uncertainty touching the boundary line which would support such an agreement. (Id.)

BRIDGE. See Toll-bridge.

BROKERS.

1. **EXCHANGE OF LANDS—COMMISSION TO BROKER—ACCEPTANCE OF OFFER TO EXCHANGE—IMPEACHMENT OF CONTRACT.**—A written contract obligating the promisor to pay a commission to a broker, upon the latter's securing an acceptance of an offer made by the prom-

BROKERS (Continued).

isor to a third party for the exchange of land, is valid, and can be impeached or set aside by the promisor only by showing that its execution was obtained by duress, menace, fraud, undue influence, or mistake, or that it was without consideration. (Lundeen v. Ottis, 183.)

2. **CONSIDERATION—COMMISSION WHEN EARNED.**—Such contract is founded upon a sufficient consideration, and entitles the broker to the commission upon obtaining an agreement from such third person that would bind him to make the exchange. After such an agreement had been obtained, the broker's right to the commission cannot be defeated by the abandonment by his principal of his own right to enforce performance of the agreement for exchange. (Id.)
3. **REFORMATION OF CONTRACT—INSUFFICIENT ALLEGATIONS OF FRAUD AND MISTAKE.**—In an action by the broker to recover the stipulated commission, an answer which seeks a reformation of the contract, so as to make the commission payable only upon the consummation of the exchange, but which merely alleges that prior to the execution of the contract the defendant had agreed to pay a commission if the exchange were consummated, and that the plaintiff, at the time of its execution, had stated that he would expect to be paid a commission only in that event, is insufficient to show either fraud or mistake in the execution of the contract, and does not warrant its reformation on either of such grounds. (Id.)
4. **REFUSAL OF AMENDMENT TO ANSWER—TRUTHFUL REPRESENTATIONS BY AGENT.**—The refusal of the court to allow such answer to be amended, by alleging that at the time of the execution of the contract the parties stood in confidential relations to each other, and that the plaintiff had represented the contract to be an agreement for an exchange of property, was not erroneous, if the contract as executed was in legal effect such an agreement. Such representation being true, and nothing being alleged to show that it was misleading, did not constitute fraud, even if the parties did stand in confidential relations. (Id.)

BUILDING AND LOAN ASSOCIATIONS.

1. **MORTGAGE LOAN TO STOCKHOLDER—PLEDGE OF SHARES—INSOLVENCY OF ASSOCIATION—CREDIT OF STOCK PAYMENTS ON LOAN.**—A stockholder in a building and loan association, who, in consideration of a loan, gives an ordinary promissory note to the association, in which he unconditionally obligates himself to pay in money the amount stipulated therein, with interest at a specified rate, and secures the same by a mortgage and a pledge of his shares of stock in the association, is not entitled, upon the insolvency of the association, to be credited on his mortgage indebtedness with the amount of installments paid by him on account of the purchase price of his stock, or with the amount of any

BUILDING AND LOAN ASSOCIATIONS (Continued).

profits earned by the association which are apportionable to such stock, in the absence of any provision in either the note, mortgage, certificate of stock, or by-laws of the association, that warranted the application of such amounts to the credit of the mortgagor on account of his note, or that rendered the transaction, so far as the stock was concerned, anything more than a mere pledge by way of security for the payment of the note. (*Groover v. Pacific Coast Savings Society*, 67.)

2. PAYMENT OF LOAN BY MATURED STOCK IN EVENT OF SOLVENCY.—

The fact that, if the association had continued a solvent concern, and the mortgagor had continued to make payments on account of his stock until it had attained its par value, he would have been able to discharge his mortgage indebtedness with the amount then due him on account of the stock, is immaterial in determining what the mortgage contract was. (*Id.*)

3. DUAL RELATION OF STOCKHOLDER AND BORROWER—OBLIGATION TO PAY LOAN—RIGHT OF STOCKHOLDERS TO SHARE IN ASSETS.—

Under such a contract, the dual relations of stockholder and borrower occupied by a borrowing stockholder of the association are entirely separate and distinct, and the fact that the association becomes insolvent cannot affect the obligation of the borrower so far as the necessity of paying in full the amount of his loan and interest thereon is concerned. Upon such insolvency, the borrowing stockholder must repay to the association at once the amount loaned with interest, and as to stock payments he is to be treated as a nonborrowing member. After the assets are collected and the indebtedness of the association paid, the fund which may remain is to be distributed *pro rata* among all the stockholders on the basis of the amounts paid by them respectively as dues on their stock, whether they are borrowing or nonborrowing stockholders. (*Id.*)

CERTIORARI. See *Justice's Court*, 1, 2; *Toll-Bridge*, 4.

CHOSE IN ACTION. See *Assignment*, 1-8; *Estates of Deceased Persons*, 1, 2.

CLAIM AND DELIVERY. See *Place of Trial*, 1.

COMMUNITY PROPERTY.**1. PRESUMPTION—EVIDENCE TO OVERCOME—BURDEN OF PROOF.—**

All property acquired by either spouse during the existence of the marriage is presumed to be community property, and the burden of overcoming the presumption by clear and satisfactory evidence rests upon the party claiming that the property is separate. (*Estate of Nicolls*, 368.)

2. CHARACTER OF PROPERTY REMOVED FROM ANOTHER STATE.—

If a husband and wife acquire personal property in one state and then

COMMUNITY PROPERTY (Continued).

remove with the same into a state in which the community law prevails, the law of the state where they lived when the property was acquired will govern as to whether it be separate or community property. (Id.)

3. **PROPERTY ACCUMULATED DURING MARRIAGE IN ILLINOIS—NOT COMMUNITY PROPERTY IN CALIFORNIA.**—There is not in the state of Illinois such a thing as community property. Consequently, property accumulated in that state by a man and wife during their marriage, and subsequently brought into the state of California, did not, nor did any property for which it was there exchanged, become community property in the latter state. (Id.)

See Estates of Deceased Persons, 9; Homestead, 3.

COMPROMISE. See Consideration.

CONSIDERATION.

1. **COMPROMISE OF DISPUTED CLAIM—ABSENCE OF GOOD FAITH.**—An agreement to settle a claim upon which suit has not been begun is not supported by a sufficient consideration if the party seeking to enforce it knew his claim to be groundless and did not assert it in good faith. (Snowball v. Snowball, 476.)
2. **PROMISSORY NOTES—SETTLEMENT OF WILL CONTEST—INTENTION TO CONTEST—EVIDENCE.**—In an action on promissory notes given by a mother to her son in settlement of his threatened contest of his father's will, and which was defended on the ground that there was no consideration for the notes due to the fact that the payee had no intention to make such contest at the time the notes were executed, the refusal of the court to permit a witness for the defendant to answer the question whether or not, about one month before the settlement, the payee had stated he had no intention of contesting the will and was satisfied with it, will not be deemed sufficiently prejudicial to require a reversal where there was no indication as to the nature of the answer the witness would have made to the question, and the evidence introduced left no doubt that the son subsequently had the intention to contest. (Id.)

See Brokers, 2; Contract, 1-3.

CONSTITUTIONAL LAW. See Employer and Employee, 7-11; Habeas Corpus, 3-6; Jury and Jurors, 1-2; Office and Officers, 3-9; Poisons, 5; Schools, 1; Tide Lands, 4; Water and Water-Rights, 9.

CONTRACT.

1. **WRITTEN CONTRACT—PRESUMPTION OF CONSIDERATION.**—Under the presumption in favor of written agreements, as provided by section

CONTRACT (Continued).

1614 of the Civil Code, in the absence of proof to the contrary, an adequate consideration must be presumed to have passed at the execution of such a contract, and, if necessary, it will be assumed that it consisted of something of value not mentioned in the agreement itself, unless the terms of the agreement are such as to exclude or forbid such assumption. (*Vickrey v. Maier*, 384.)

2. **RECIPROCAL PROMISES OF PARTIES TO CONTRACT.**—A promise by one party may be a sufficient consideration for the promise of another, and where there are mutual or reciprocal promises in a written agreement each constitutes a consideration for the other, particularly where it is expressly so declared. (*Id.*)
3. **PROMISE OF PREFERENTIAL RIGHT TO PURCHASE STOCK—AGREEMENT TO BUY STOCK AT STATED PRICE AT SELLER'S OPTION.**—An agreement by the plaintiffs that if they chose to sell certain stock in a corporation they would give the defendants a preferred right to buy it over all other purchasers, is a sufficient consideration to support the agreement of the latter to pay dividends on the stock and also to buy it, at the plaintiff's option, at any time after six months, on ninety days' notice, at a stated price. (*Id.*)
4. **OBLIGATION TO PURCHASE—ELECTION TO SELL—NOTICE OF ELECTION—OFFER OF DELIVERY.**—Such an agreement imposed no obligation on the defendants to buy the stock at the price stated, unless the plaintiffs elected to sell it, and gave the notice, nor, even after such election and notice, until they had offered to deliver the stock in pursuance of the agreement. (*Id.*)
5. **ACTUAL DEMAND NECESSARY TO RIGHT OF ACTION—STATUTE OF LIMITATIONS.**—The general rule is, that where an actual demand is essential as a condition precedent to a complete right of action for the recovery of money, such demand must be made within a reasonable time after it can lawfully be made, or within a reasonable time after the contract by its terms contemplates that it should be made, and that, unless there are peculiar circumstances affecting the question, a time coincident with that of the statute of limitations, will be deemed reasonable. (*Id.*)
6. **ACTION TO RECOVER STATED PRICE—DEMAND AND TENDER OF PERFORMANCE—COMMENCEMENT OF RUNNING OF STATUTE.**—An action to recover such stated price is in effect an action to enforce performance of a contract to buy personal property, and it is governed, so far as the commencement of the running of the statute of limitations is concerned, by the same rule which controls in the case of a sale of real property. Such rule is, that where a party may call for the performance of the agreement upon the part of another only by a tender or offer to perform his own agreement, there can be no breach of the contract by the one until such offer or tender by the other, and the statute will not begin to run until that time. (*Id.*)

CONTRACT (Continued).**7. DEMAND FOR PERFORMANCE—NOTICE OF ELECTION TO SELL—LACHES.**

Where such agreement of purchase was in writing, and the plaintiffs, within four years after its execution, set in motion proceedings for a demand for performance by the defendants and made the actual demand within a few months thereafter, they were not guilty of laches sufficient to bar their action to recover the price stated. (Id.)

8. Judgment reversed on the authority of *Vickrey v. Maier*, ante, p. 384. (*Vickrey v. Maier*, 774.)

See Brokers; Employer and Employee, 22; Guaranty; Penalty; Restraint of Trade; Specific Performance; Water and Water-Rights, 12-14.

CORPORATIONS.**1. NONPAYMENT OF LICENSE-TAX — FORFEITURE OF CHARTER — TERMINATION OF EXISTENCE — NONLIABILITY TO SUIT — VOID JUDGMENT — STOCKHOLDER MAY AVOID.**—A corporation organized under the laws of California for profit, whose franchise and charter have been forfeited for noncompliance with the act of March 20, 1905, requiring the payment of an annual license-tax, ceases to have a corporate existence and cannot be sued, and a judgment obtained against it is void and may be impeached at the instance of a stockholder therein, who intervenes in the action in which the judgment was rendered for the purpose of expunging it from the records. (*Newhall v. Western Zinc Mining Co.*, 380.)**2. JUDICIAL DETERMINATION NOT ESSENTIAL TO FORFEITURE.**—The forfeiture provided for by that act is not dependent upon judicial determination and decree, but is self-acting and operating. (Id.)**3. SHOWING BY STOCKHOLDER—ACCRUAL OF CORPORATE LIABILITY—CORPORATE ASSETS.**—In such intervention proceeding by the stockholder, it is not necessary that he should show that he was a stockholder at the time the liability upon which the judgment was obtained against the corporation accrued, nor the fact that the corporation had assets. (Id.)**4. ESTOPPEL BY STOCKHOLDER—ANSWER BY FORMER DIRECTOR.**—Such stockholder is not estopped from complaining of such judgment, by reason of the fact that one of the former directors of the defunct corporation, who became under the provisions of that act the trustees to wind up its corporate affairs, filed an answer in the action admitting the corporate existence of the defendant. (Id.)**5. DIRECTORS AS TRUSTEES OF CORPORATION—CANNOT ANSWER IN NAME OF CORPORATION.**—Such act authorizes the directors, and not one of them, to act as trustees. It empowers them as trustees to sue and be sued but not to answer suits in the name of the defunct corporation. (Id.)

CORPORATIONS (Continued).

6. **LEASE BY CORPORATION—SIGNING BY INDIVIDUAL—PAROL EVIDENCE OF AGENCY AND AUTHORIZATION.**—Where a written instrument of lease purports on its face to be the act of a corporation, but is signed, not by the corporation, but by an individual, a stranger to the contract, parol evidence is admissible, in an action by the corporation to recover the rent reserved, to show that the person signing did so for and on behalf of the corporation pursuant to authority so to do. (*Pacific Improvement Company v. Jones*, 260.)
7. **CAPITAL STOCK DEFINED—ASSETS—PROHIBITION AGAINST PAYING TO STOCKHOLDERS.**—The phrase “capital stock,” as used in section 309 of the Civil Code, prohibiting directors of corporations from dividing, withdrawing, or paying to the stockholders, or any of them, any part of the capital stock, or from reducing or increasing the capital stock, except as therein provided, means the actual capital, the assets, with which the corporation carries on its corporate business, and not the shares of which the nominal capital is composed. (*Schulte v. Boulevard Gardens Land Company*, 464.)
8. **STOCKHOLDERS HAVE NO POWER TO DO FORBIDDEN ACTS.**—Although the prohibition of that section runs, in terms, only against the directors, the effect of the section is to deprive the stockholders as well of power to do the forbidden acts. (*Id.*)
9. **CORPORATION CANNOT PURCHASE ITS OWN STOCK.**—In view of that section, a corporation in this state, is not authorized to employ its assets for the purchase of shares of its own stock, since the result would be to illegally withdraw and pay to a stockholder a part of the capital stock. (*Id.*)
10. **AGREEMENT OF CORPORATION TO REPURCHASE STOCK—CONDITION OF CONTRACT UNDER WHICH STOCK WAS ISSUED.**—An agreement by a corporation, constituting a condition and a part of the consideration of an entire contract under which its stock was originally issued, obligating it, at the election of the stockholder, to repurchase the stock at a stated price, is not within the inhibition of the section. Such an agreement is enforceable against the corporation, subject to the qualification that the rights of creditors are not injuriously affected, and that it would not result in a fraudulent invasion of the rights of other stockholders. (*Id.*)
11. **AMOUNT PAYABLE ON RETURN OF STOCK IMMATERIAL.**—It is immaterial to the validity of such an agreement whether the amount to be paid by the corporation on the return of the stock was equal to, or more or less than, the original price for which it was issued. (*Id.*)
12. **CORPORATION—REPURCHASE OF STOCK.**—Judgment reversed on the authority of *Schulte v. Boulevard Gardens Land Company*, ante, p. 464. (*Nichols v. Boulevard Gardens Land Company*, 775)

CORPORATIONS (Continued).

- 13. SUBSCRIPTION TO STOCK IN PARTICULAR CORPORATION—APPLICATION TO STOCK IN DIFFERENT COMPANY—LIABILITY TO REFUND.**—Where an agent authorized to obtain subscriptions to the capital stock of two different corporations, diverts money specifically paid him for a subscription to the original stock of one of such corporations, and attempts to apply it for a subscription to the stock of the other, and the money is so received and applied by the other, both the agent and the corporation obtaining the money, although it may have had no knowledge of the terms on which the agent received it, are liable to refund it to the payer, as for money had and received to his use, if it was impossible to apply the money on account of a subscription for the stock of the intended corporation, due to the fact that all of the stock of that company had been subscribed for prior to the date of the payer's subscription. (*Gray v. Ellis*, 481.)
- 14. CORPORATIONS OF SAME CHARACTER AND HAVING PROPERTY OF SAME VALUE.**—It is immaterial to the right to recover such money that there was no difference in the value of the stock of the two companies, and that the property of one corporation was the same in character and value as that of the other. (*Id.*)
- 15. INSTRUCTIONS REQUESTED BY APPELLANT.**—The appellants cannot complain of instructions to the jury, which left them to determine whether under the subscription agreement the payers of the money had the right to elect which stock his money was to be applied on, if they joined in requesting instructions to that effect. (*Id.*)
- 16. ORIGINAL SUBSCRIPTION TO STOCK—ACCEPTANCE OF STOCK ALREADY ISSUED.**—One who has contracted to take stock in a company as an original subscriber thereto, cannot be compelled to accept from others, in satisfaction of his rights under such contract, any stock that had been subscribed for by, and issued to, other persons, and that was then owned by other persons. (*Id.*)
- 17. CORPORATION AGENT AND TRUSTEE FOR STOCKHOLDERS—DIRECTORS AS TRUSTEES.**—A corporation is the agent and trustee of its stockholders, in their behalf and for their use and benefit holding, controlling, and managing the corporate property and business. The directors are the trustees for the stockholders and also for the corporation. (*Hobbs v. Tom Reed Gold Mining Company*, 497.)
- 18. FOREIGN MINING CORPORATION—STOCKHOLDER'S RIGHT TO INSPECT—MANDAMUS TO ENFORCE RIGHT—ORDER BY DIRECTORS TO PERMIT INSPECTION.**—The courts of this state have power to issue a writ of mandate, at the instance of a stockholder in a mining corporation organized under the laws of a foreign state, and whose mining property was there situated, but which had its principal place of business, and all of whose directors resided, in this state, commanding the directors to make and deliver to such stockholder an order to the

CORPORATIONS (Continued).

persons in charge of the mine, instructing them to permit the stockholder to enter and examine the same. Ample power to compel obedience to such writ is conferred by section 1097 of the Code of Civil Procedure, although, doubtless the power would exist in the absence of such express grant. (Id.)

19. **RIGHT OF VISITATION AND INSPECTION.**—A stockholder of a mining corporation has the right to visit and inspect the mines of the company, both at common law, and by virtue of section 589 of the Civil Code. (Id.)

20. **MANDAMUS TO ENFORCE RIGHT—RIGHT AT COMMON LAW AND UNDER STATUTE.**—Where such right of visitation and inspection is given by statute, the rule is that, unless the statute imposes restrictions or limitations, the right is absolute and may be enforced by *mandamus*, regardless of the purposes or motives of the stockholder, or the existence of good cause. Where the right to be enforced is a common law right, the issuance of the writ is discretionary, and the motives of the stockholder may be questioned, and he is required to show good cause for granting the relief. (Id.)

21. **PRESUMPTION AS TO LAW OF FOREIGN STATE—IDENTITY WITH LAW OF THIS STATE.**—In a proceeding by *mandamus* against such a foreign mining corporation to enforce a stockholder's right of visitation and inspection, it must be presumed, in the absence of a contrary showing, that the laws of the foreign state under which the corporation was organized and where its mines were situated, conferred the same right to visit and examine as that provided for by section 589 of the Civil Code of the state. If it should appear that such foreign state had no such law, substantially the same right and duty would exist under the common law, provided the inspection was desired for a legitimate purpose and good cause was shown therefor. (Id.)

See Assignment, 9; Building and Loan Association; Eminent Domain, 13-17; Inheritance Tax, 4; Mines and Mining, 2; Municipal Corporations; Water and Water-Rights, 6-8.

COSTS. See Rescission, 4; Will, 31, 32.

COURTS. See District Court of Appeal; Habeas Corpus; Justices' Courts; Superior Court; Supreme Court.

CREDITOR'S BILL.

1. **PLAINTIFF MAY MAINTAIN ACTION BEFORE JUDGMENT BECOMES FINAL.**—The general rule that until a judgment becomes final by affirmance on appeal or by lapse of the time within which an appeal might be taken, such judgment is not admissible in evidence and cannot be relied on as the foundation of rights declared

CREDITOR'S BILL (Continued).

in it, does not apply to an action in the nature of a creditor's bill, the purpose of which is to apply to the judgment creditor's demand property of the judgment debtor which was transferred by such debtor with intent to delay or defraud his creditors. (Sewell v. Price, 265.)

2. **RIGHT OF CREDITOR TO ATTACK FRAUDULENT TRANSFER BY DEBTOR—CLAIM MUST BE REDUCED TO JUDGMENT.**—Under section 3441 of the Civil Code, a creditor can avoid the act of his debtor for fraud only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer. Consequently he is not in a position to attack a transfer for fraud unless he has a specific lien upon the property transferred or has reduced his claim against the debtor to judgment. (Id.)
3. **NATURE OF ACTION—RIGHT TO LEVY EXECUTION.**—Such action by the judgment creditor is not, strictly speaking, an action upon his judgment. It is really an action for equitable relief against the obstruction caused by a transfer which hinders him in satisfying his claim by the ordinary process of law, that is to say, by an execution, and if he has put himself in a position to levy execution, he has done everything necessary to enable him to attack the transfer which hinders his enjoyment of his right. (Id.)
4. **LEVY OF EXECUTION UNDER MONEY JUDGMENT—ABSENCE OF STAY-BOND.**—The fact that the time for appeal has not expired does not prevent the issuance or levy of execution under a money judgment, nor is the right to have execution affected by the fact that an appeal is actually taken, unless an undertaking to stay execution has been given. Consequently, in the absence of such undertaking, a plaintiff who has recovered judgment may maintain a creditor's bill, notwithstanding the fact that the time for an appeal has not expired, or an appeal has actually been taken and is pending. (Id.)
5. **FINDINGS—OMISSION TO FIND AS TO OWNERSHIP OF PORTION OF PROPERTY.**—In such an action, where the complaint alleges a fraudulent transfer of an entire piece of land, and the court finds that only a half interest therein was fraudulently transferred, its failure to find upon the title or ownership of the other half interest is without prejudice to the defendants and is not ground for reversal. (Id.)
6. **FRAUDULENT INTENT QUESTION OF FACT—SUFFICIENT ALLEGATION AND FINDINGS.**—In such an action, the question of fraudulent intent in the transfer is one of fact and not of law, and the fact must be alleged and found. An allegation and a finding that on a certain day the judgment debtor, "with the purpose of concealing his property and defrauding his creditors, and particularly the plaintiff herein, without consideration assigned" the property in question to a specified person, are sufficient. (Id.)

CREDITOR'S BILL (Continued).

7. **TRANSFER OF PROPERTY NOT INVOLVED IN ACTION—FINDING OF FRAUDULENT INTENT NOT NECESSARY.**—Where the complaint in such action seeks to set aside the transfer of certain specified properties, and alleges the transfer of other property by the judgment debtor solely for the purpose of showing that he did not have property, other than that involved in the action, out of which the plaintiff's execution might be satisfied, it was not necessary that the court should find that the latter transfer was fraudulent. (Id.)
8. **REVERSAL OF JUDGMENT ON WHICH CREDITOR'S SUIT IS BASED.**—On an appeal from a judgment in favor of the plaintiff in such creditor's suit, the supreme court cannot, in the absence of any showing in the record, take judicial notice of the fact that the judgment on which the action was founded had been reversed. (Id.)
9. **REFUSAL TO CONSIDER REVERSAL—EFFECT OF RIGHTS OF APPELLANTS.**—The refusal of the supreme court on the appeal in the creditor's suit to consider the reversal of the judgment on which the action was founded, will not work an irreparable injury to the appellants, because (1), if such judgment has been reversed no execution can issue thereunder, and (2), if the judgment in the creditor's suit be affirmed, adequate relief may be had in an independent action in equity to restrain the plaintiff from taking advantage of the judgment. (Id.)

CRIMINAL LAW.

1. **ASSAULT WITH INTENT TO COMMIT INFAMOUS CRIME AGAINST NATURE—WANT OF CONSENT ESSENTIAL TO ASSAULT.**—An assault with the intent to commit the infamous crime against nature implies repulsion, or at least want of consent on the part of the person assaulted, and where such want of consent is shown, the fact that the defendant was interrupted and his attempt rendered abortive did not make his conduct any the less criminal. (People v. Dong Pok Yip, 143.)
2. **AGE AND MENTALITY OF PERSON ASSAULTED—ASSAULT ON YOUNG CHILD.**—In such a case the age and mentality of the person assaulted is important and should always be considered in determining the presence or absence of consent, and the mere submission of a child of tender years or retarded mental development to an attempted outrage of his person should not, in and of itself, be construed to be such a consent as would, in point of law, justify or excuse the assault. (Id.)
3. **DIFFERENCE BETWEEN SUBMISSION AND CONSENT.**—There is a decided difference in law between mere submission and actual consent. Consent, in law, means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice, to do something proposed by another. It differs very mate-

CRIMINAL LAW (Continued).

rially from assent and implies some positive action and always involves submission. Assent means mere passivity or submission which does not include consent. (Id.)

4. **EVIDENCE—SUPPORT OF CONVICTION OF LESSER OFFENSE.**—Where the evidence clearly would support a verdict for a higher offense, the conviction of a lesser crime necessarily included therein will not be set aside. (Id.)
5. **CONVICTION OF SIMPLE ASSAULT.**—Where the evidence is sufficient to support a conviction of an assault with the intent to commit the infamous crime against nature, a conviction of a simple assault will be upheld. (Id.)
6. **SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION OF AN ATTEMPT.** It is not true as a rule of law that evidence which is insufficient to sustain a conviction for a crime would be insufficient to sustain a conviction for an attempt to commit the crime. (Id.)
7. **CROSS-EXAMINATION OF PERSON ASSAULTED—STATEMENTS BY DEFENDANT.**—On a trial for such offense, where the child alleged to have been assaulted was called as a witness for the defendant and gave his version of the occurrence, anything that the defendant may have said at the time became relevant and material and admissible in evidence on cross-examination, and the fact that the conversation narrated by the witness disclosed a statement of the defendant prejudicial to him and irrelevant to the issue being tried, did not render its admission erroneous. (Id.)
8. **MURDER—PHOTOGRAPH OF PLACE OF HOMICIDE—SUFFICIENT EVIDENCE OF CORRECTNESS.**—In a prosecution for murder, a sufficient foundation is laid for the admission in evidence of a photograph showing the relative location in the room in which the homicide took place, at the time thereof, of certain personal objects, by the testimony of a witness to the effect that he was in the room and took the negative of the photograph shortly after the killing and at a time when such objects were in exactly the same position that they were at the time of the homicide, and that the photograph offered in evidence, which had been finished by a photographer to whom he had given the negative for that purpose, was a correct representation of the objects sought to be shown and their relative location at the time he took the picture. (People v. Ah Lee, 350.)
9. **OVERCOAT WORN BY DEFENDANT—EVIDENCE OF IDENTIFICATION.**—In such prosecution, an overcoat worn by the defendant at the time of his arrest, on the day following the homicide, was properly admitted in evidence, where there was testimony tending to show that he was seen on a street of the town in which the homicide was committed, and shortly before its occurrence, in the company of his codefendant, wearing an overcoat similar to the one received in evidence, and

CRIMINAL LAW (Continued).

- also testimony tending to show that one of the two men committing the murder wore at the time such an overcoat. (Id.)
10. **INSTRUCTION—REASONABLE DOUBT.**—A general instruction on the subject of reasonable doubt, which is otherwise free from error, is not rendered objectionable by the inclusion therein of the phrase “a reasonable doubt is not a mere guess or surmise.” (Id.)
11. **MOTIVE—REQUESTED INSTRUCTIONS—SUBJECT MATTER COVERED BY INSTRUCTION GIVEN.**—It was not error for the court to refuse to give an instruction requested by the defendant on the question of motive, where the subject matter of the requested instruction was fully covered, so far as it could be reasonably claimed that defendant was entitled to have it covered, by an instruction given to the effect that there could be no presumption of motive in the absence of a showing thereof, and that the jury had the right to consider the absence of motive in determining the guilt or innocence of defendant. (Id.)
12. **MURDER—INCOMPETENT EVIDENCE OF PRIOR MURDER—ERROR CURED BY TESTIMONY OF DEFENDANT.**—On a prosecution for murder, error in the admission of incompetent evidence to show a prior murder by the defendant, as a motive for the crime for which he was being tried, is cured, if the defendant, as a voluntary witness in his own behalf, testified to facts substantially corroborating all the incompetent evidence admitted. (People v. Prantikos, 113.)
13. **KILLING OF POLICE OFFICER—PRIOR MURDER PART OF RES GESTAE—EVIDENCE.**—Where the defendant, after being arrested by a police officer, shot him, and immediately afterward, while endeavoring to escape from the scene, shot and killed another officer, the shooting of the first officer was part of the *res gestae* of the killing of the latter, and on a prosecution for the latter, evidence of the first shooting, and that the officer subsequently died as the result thereof, is admissible. (Id.)
14. **MURDER—EVIDENCE.**—In a prosecution for murder, the evidence is held sufficient to justify the conviction of murder in the first degree. (People v. Bauweraerts, 696.)
15. **ABSENCE OF MOTIVE—REASONABLE DOUBT.**—The absence of motive is a fact favorable to one accused of crime, and is to be considered in weighing the evidence against the defendant. But, of itself, it does not, as matter of law, establish innocence or necessarily raise a reasonable doubt of guilt. Its effect is a question for the jury to decide. (Id.)
16. **CROSS-EXAMINATION OF DEFENDANT — IMPEACHMENT — CONVICTION OF FELONY—MISCONDUCT OF DISTRICT ATTORNEY—REPETITION OF QUESTION.**—The defendant in a criminal prosecution, where he offers himself as a witness, may be asked, for the purposes of impeachment, if he has not been convicted of a felony; and the

CRIMINAL LAW (Continued).

repetition of the question in different forms, after a negative answer had been given to the first question, will not be deemed prejudicial misconduct by the district attorney, depriving the defendant of a fair trial, where it appears that he was unfamiliar with the English language, especially legal phrases, and his examination indicated an intent to evade a direct answer. (Id.)

17. **MURDER—EVIDENCE OF DYING DECLARATIONS—BELIEF OF IMPENDING DEATH.**—In a prosecution for murder, it is the abandonment of hope and the expectation of certain and imminent death by the person injured, and the belief of the law that at such an awe-inspiring time, a man about to be called to account before his Maker, will tell the truth, that alone justify the reception in evidence of his dying declarations against the defendant. (People v. Smith, 451.)
18. **REAFFIRMANCE UNDER BELIEF OF DEATH OF STATEMENT PREVIOUSLY MADE.**—A statement of the deceased, made at a time when he was not under the belief of immediate and impending death, may afterward, while under the fear of death, be reaffirmed by him under circumstances entitling it to admission. Greater care, however, should be exercised by the trial court, and a more satisfactory showing of the declarant's condition of mind made manifest, than where the statement itself is uttered in the first instance under the circumstances required by the law. (Id.)
19. **EVIDENCE—REAFFIRMANCE OF STATEMENT NOT UNDER BELIEF OF DEATH.**—In the present case, it is held that the evidence is conclusive that the statement of the deceased was not made originally under the circumstances contemplated by the law, and that the showing is wholly insufficient to establish that it was reaffirmed afterward under such circumstances. The fact that the deceased was dying, although significant, is not controlling. The fact of controlling significance is his belief that the hand of death was upon him. (Id.)
20. **INSTRUCTION—SELF-DEFENSE—MISTAKE AS TO EXTENT OF APPREHENDED DANGER—"JUDICIOUS MAN."**—In a prosecution for murder, in which self-defense was pleaded in justification, an instruction that if the defendant "acted from reasonable and honest convictions, he cannot be held criminally responsible for a mistake in the actual extent of the danger, when other judicious men would have been alike mistaken," is rendered objectionable from the use of the word "judicious," instead of the accepted word "reasonable." (Id.)
21. **"ORDINARILY COURAGEOUS MAN."**—The use of the phrase "ordinarily courageous man," instead of the phrase "ordinarily reasonable and prudent man," in an instruction that "if one person kills another through mere cowardice or under circumstances which are not, in the opinion of the jury, sufficient to induce a reasonable and well

CRIMINAL LAW (Continued).

founded belief of danger to life or of great bodily harm in the mind of an ordinarily courageous man, the law will not justify the killing on the ground of self-defense," is objectionable. (Id.)

22. **THREATS AGAINST LIFE—ATTEMPT COUPLED WITH ABILITY TO TAKE LIFE.**—An instruction "nor does the fact that one person had made threats against the life of another, though taken in connection with the fact that the threatener was of a violent and dangerous character, justify or excuse an immediate resort to deadly weapons, resulting in killing him, in the absence of some demonstration, real or apparent, of an attempt, coupled with ability, to take life," is objectionable in stating that the demonstration or attempt shall be "coupled with ability to take life," before the defendant may resort to a deadly weapon in his self-defense, instead of stating that the demonstration or attempt should be coupled with a real or apparent ability to take life. (Id.)

23. **CIRCUMSTANTIAL EVIDENCE.**—Where there was only direct evidence of the homicide, and the fact of its commission was admitted, there was no occasion to instruct the jury upon the character and value of circumstantial evidence. (Id.)

24. **REASONABLE DOUBT—ERRONEOUS INSTRUCTION.**—An instruction that "a doubt to justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case. If, after considering all the evidence you can say that you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt," is erroneous. (Id.)

See Habeas Corpus.

DAMAGES. See Ejectment, 5, 6; Employer and Employee, 24; Negligence, 2, 10; Penalty; Pledge, 1, 2.

DEBTOR AND CREDITOR. See Assignment, 1-8; Creditor's Bill.

DECEIT. See Fraud.

DEED.

1. **CONDITIONS SUBSEQUENT—CONSTRUCTION.**—Conditions subsequent in a deed tending to restrict and defeat an estate are not favored. They can be created only by apt and appropriate language which *ex proprio vigore* establishes that only a conditional estate was conveyed, and when such a condition is shown to have been created, the rule of construction is that of strictness against the grantor and in favor of the holder of the estate. (Fitzgerald v. County of Modoc, 493.)

2. **CREATION OF CONDITIONS SUBSEQUENT.**—Generally, the apt and appropriate words evidencing that a grant is on condition subsequent are found in a provision for forfeiture and right of re-entry. If,

DEED (Continued).

however, the language employed declares a condition and imports a forfeiture, a clause of re-entry is not necessary. (Id.)

3. **RECITAL OF PURPOSE FOR WHICH LAND IS CONVEYED.**—A provision in a deed to a county merely reciting that the land conveyed is “to be used as and for a county high school ground and premises,” for the grantee, does not create a condition subsequent. (Id.)
4. **CIRCUMSTANCES UNDER WHICH DEED WAS MADE.**—The facts and circumstances under which such deed was made, if not expressed in the deed itself, cannot be considered to enlarge or restrict the estate actually granted. (Id.)
5. **RULE IN SHELLEY’S CASE—REMAINDER TO HEIRS OR HEIRS OF BODY.**—The so-called rule in Shelley’s case is that where a will devises or a deed grants land to A for life, and the remainder after his death to his heirs, or to the heirs of his body, using these words or words having the same legal effect, the effect is to vest in A a fee simple absolute if the remainder is to his “heirs,” or a qualified fee, if it is to the “heirs of his body.” The heirs of A in such a case take no estate or interest in the land during the life of A, and he may dispose of it as if the deed or will contained no words purporting to transfer to him less than a fee. As it is usually stated, the words “heirs” or “heirs of his body,” or whatever other words of like effect are used, are words of limitation and not of purchase. (Gordon v. Cadwalader, 509.)
6. **FOUNDATION OF RULE IN SHELLEY’S CASE.**—The fundamental reason for the rule in Shelley’s case is that at common law it was considered that the words “and to his heirs” or “and to the heirs of his body,” following a grant purporting to be of an estate for life, necessarily implied that the heirs mentioned should take by inheritance from the life tenant, and not directly by the deed, or directly from the grantor, and as this could not be so unless the life tenant had an estate of inheritance to pass at his death, it followed as a necessary consequence that the deed must be understood to pass the fee to him as well as the life estate. (Id.)
7. **RULE ONE OF POSITIVE LAW—INTENT—MEANING OF WORD “HEIRS.”**
In the phrases quoted, when the rule in Shelley’s case applies, the word “heirs” is used in the broad sense, to signify the persons who take the estate by succession from generation to generation, forever, or as it is sometimes expressed, the whole inheritable blood of the life tenant, so that such life tenant, and not those who may be his heirs at his death, is the original stock of inheritance. It is a rule of positive law, and defeats even the declared contrary intent if, notwithstanding such declaration, it appears that the word “heirs” was used in this technical sense. But the primary question is always the one whether or not it was so used. (Id.)

DEED (Continued).

8. **INTERPRETATION OF GRANT—INTENTION TO CREATE LIFE ESTATE WITH REMAINDER OVER.**—If the deed contains words which modify or qualify these phrases to such an extent that a reasonable interpretation of the grant is that the grantor did not use the words to describe the whole line of succession from the life tenant, or his whole inheritable blood, but, on the contrary, intended thereby to point out and designate the particular persons who should take the estate upon the death of the life tenant, and to describe them as the persons then to take the estate direct from the grantor, and by virtue of the grant, constituting of them a new root of inheritance, the implication as to the meaning of said phrases, upon which the rule is founded, would not exist, and the rule would not govern the grant. (Id.)
9. **CONSTRUCTION OF DEED—RULE IN SHELLEY'S CASE INAPPLICABLE.**—The deed in question, which was executed at a time when the rule in Shelley's case was in force in this state, granted unto the party of the second part "for and during the term of his natural life, and after his death then to descend to his heirs and assigns forever," certain described lands, and recited that "the said land being conveyed to the said . . . for and during his natural life, for the final use, benefit, and behoof of the children, or other lawful heirs of his body, who may survive him." The *habendum* clause was "to have and to hold . . . unto the said party of the second part, his heirs and assigns forever," and a further clause contained a warranty to "the said party of the second part, his heirs and assigns." The final clause stated that the words "for and during the term of his natural life, and after his death then to descend to," were interlined, and the words "and to" were erased, before the execution of the deed. *Held*, that the deed did not come within the rule in Shelley's case, and that the words used manifested the intent that the grant to the immediate grantee was for life only, and that the remainder was to go to the surviving children or grandchildren, directly by the deed and not by inheritance, and that they, and not such grantee, were to constitute the new stock or root of inheritance of the estate. (Id.)
10. **MEANING OF WORDS "DESCEND TO."**—The words "descend to," as used in such deed, should be construed as words of transfer, and the passage in which they occur should be read as if it declared that after the death of the immediate grantee the land should "go to" or "vest in" his heirs, the latter words being used as a description of the persons to whom the remainder is transferred, and not to indicate a taking by the law of inheritance. (Id.)
11. **REFORMATION OF DEED—PRIOR DEMAND NOT NECESSARY TO ACTION.**—An action will lie in this state for the reformation of a deed without a demand previously made. (Danielson v. Neal, 748.)

DEED (Continued).

12. **PRIOR DEMAND WHEN ESSENTIAL TO CAUSE OF ACTION.**—Wherever a right arises or is dependent upon demand, that is, when the demand is an integral part of the cause of action, it must be made before action brought. But when it is an unconditional duty of a defendant to perform a certain act, the suit itself is the only demand necessary. In some cases, no other consequences follow a failure to make demand before suit brought, than that the plaintiff will not be allowed to recover his costs. (Id.)
13. **QUANTITY OF LAND CONVEYED—"MORE OR LESS"—MISTAKE AS TO QUANTITY.**—The inclusion in a deed of the words "more or less" in the description of the quantity of land conveyed, does not preclude a reformation of the deed for mistake in not embracing all the acreage agreed upon. (Id.)
14. **VALUE OF OMITTED LAND—REFORMATION NOT REFUSED BECAUSE OF SMALLNESS.**—The fact that the value of the omitted land, upon the basis of the purchase price, was only eighty-three dollars, will not in itself prevent a court of equity from granting a reformation of the deed. (Id.)
15. **STATUTE OF LIMITATIONS—LACHES—ERROR PATENT ON FACE OF DEED.**—Where the omission to convey all the land agreed upon was patent upon the face of the deed, the mere fact that the grantee failed to discover it does not charge him with laches, or set the statute of limitations in motion prior to the discovery of the mistake. (Id.)

See Boundary; Easements, 4, 5; Laches, 4, 5; Mortgage; Taxation, 1-4.

DEED OF TRUST.

1. **QUIETING TITLE—DEFENSE OF PURCHASE AT TRUSTEE'S SALE UNDER DEED OF TRUST—EVIDENCE OF FRAUD IN SALE ADMISSIBLE WITHOUT BEING PLEADED.**—In an action to quiet title to land, in which the defendant by his answer sets up title through a sale by a trustee under a deed of trust, executed by the plaintiff's predecessor in interest, the plaintiff, in avoidance of such defense, may offer evidence to show that the trustee's sale and deed made in pursuance thereof were invalid by reason of fraud, without pleading the fraud in his complaint. (Jose Realty Company v. Pavlicevich, 613.)
2. **FRAUDULENT SALE BY TRUSTEE—ABSENCE OF DEFAULT IN PAYING INTEREST—NEW TRIAL—FINDING—SPECIFICATIONS OF INSUFFICIENCY OF EVIDENCE.**—In such action, where the court in effect found that the plaintiff was the owner of the land subject to such deed of trust, and that the attempted trustee's sale for default in the payment of interest on the note secured by the trust deed was void because the payer of such note had had sufficient funds at the place of payment for the purpose of paying such interest, specifications in the notice

DEED OF TRUST (Continued).

of intention to move for a new trial on the minutes of the court, that the evidence was insufficient to justify the findings (1) that plaintiff is the owner of the premises, (2) "that the interest which defendant has in the premises is without right," and (3) "that the money for the payment of the interest on said note was at all times ready at the place of payment," are sufficient to present the question whether or not the finding on the subject of the default in the interest payments is sustained by the evidence. (Id.)

3. **RECITAL OF DEFAULT IN TRUSTEE'S DEED—CONCLUSIVENESS IN ABSENCE OF FRAUD.**—A recital in a deed executed by a trustee in pursuance of a sale by him under a deed of trust given to secure the payment of a note, that the payer of the note was in default at the time of sale, is conclusive on the trustor and his successors in interest, where the deed of trust empowers the trustee to make it, in the absence of fraud of which the purchaser at the trustee's sale had notice. (Id.)
4. **SALE BY TRUSTEE IN ABSENCE OF DEFAULT—KNOWLEDGE BY PURCHASER—FRAUDULENT SALE—EVIDENCE INSUFFICIENT TO ESTABLISH FRAUD.**—The facts that the payee of the note, knowing that there had been no such default, declared the principal and interest due and caused the trustee to make a sale under the power by falsely informing him that the payer was in default, and that the payee himself bought in the property at the trustee's sale, and that the owners of the property were not informed of the sale or of the notice given thereof and had no knowledge of it, would be sufficient to avoid the trustee's sale and deed. It is held, however, that the evidence is insufficient to show that the payer of the note was not in default in the payment of interest, and that the payee knew he was not in default. (Id.)
5. **DEMAND FOR PAYMENT OF NOTE—DEFAULT IN PAYMENT.**—Under section 3130 of the Civil Code, no demand of payment upon the payer of a promissory note is necessary in order to create a default in payment. (Id.)
6. **NEGOTIABLE INSTRUMENT PAYABLE AT SPECIFIED PLACE—ABILITY AND WILLINGNESS TO PAY—EQUIVALENT TO OFFER OF PAYMENT—FUNDS FOR PAYMENT ESSENTIAL.**—The provision of section 3130 of the Civil Code, to the effect that if a negotiable instrument is by its terms payable at a specified place, and the principal debtor thereon is able and willing to pay it there at maturity, such ability and willingness are equivalent to an offer of payment upon his part, cannot be complied with by a mere passive ability and willingness. There must be an ability to pay manifested by providing funds at the place of payment in the hands of some person there present who is authorized to pay it on the debt and is willing to do so. (Id.)

DEED OF TRUST (Continued).

7. INSUFFICIENT EVIDENCE OF ABILITY AND WILLINGNESS TO PAY.—

Where a promissory note is made payable at the office of a specified person, mere evidence that such person, or some other person in his office, had money enough to pay the interest on the note at any time had it been demanded, without any showing that the money belonged to the payer of the note, or had been provided or placed there by him, or any other person, for the purpose of paying the interest, or that the proprietor of the office, or any other person there, was willing to pay it out on the interest, or had been authorized or instructed to do so, or that any of them intended to do so if the interest had been demanded, is insufficient to establish the equivalent of an offer to pay the interest, under section 3130 of the Civil Code. (Id.)

See Easements, 4.

DISMISSAL. See Ejectment, 7; Practice, 1.

DISTRICT COURT OF APPEAL.

1. REFUSAL OF TRANSFER TO SUPREME COURT—EFFECT ON OPINION OF

APPELLATE COURT.—An order of the supreme court, refusing to transfer a cause to that court after judgment in the district court of appeal, does not adopt the opinion of the appellate court so as to give it, in the supreme court, the authoritative effect which one of its own decisions would have. (Bohn v. Bohn, 532.)

2. DETERMINATION OF CAUSE BY SUPREME COURT—CONTRARY CONCLU-

SION REACHED BY APPELLATE COURT.—The supreme court will determine a cause pending before it in accordance with its legal conviction, notwithstanding in a case between the same parties presenting identical questions a contrary conclusion was reached by the district court of appeal, and a transfer of such case to the supreme court, after the judgment of the appellate court, was denied by the supreme court. (Id.)

See Habeas Corpus.

DIVORCE.

1. INTERLOCUTORY DECREE DOES NOT DISSOLVE MARRIAGE—FINAL

JUDGMENT.—The entry of an interlocutory decree of divorce does not dissolve the marriage, and the parties thereto remain in the legal relation of husband and wife until the marriage has been dissolved by the final judgment. (Estate of Seiler, 181.)

2. DEATH OF WIFE AFTER INTERLOCUTORY DECREE—SURVIVING HUS-

BAND ENTITLED TO LETTERS OF ADMINISTRATION.—A surviving husband, against whom an interlocutory decree of divorce has been entered, has a priority of right to letters of administration on the estate of his deceased wife. (Id.)

DIVORCE (Continued).

8. **ENTRY OF FINAL DECREE AFTER DEATH OF WIFE—HUSBAND'S RIGHTS OF INHERITANCE NOT DESTROYED.**—The entry of a final decree in the divorce action, after the death of the wife, as provided in section 132 of the Civil Code, did not operate retroactively to take away rights of inheritance which had, by such death, become vested in the surviving husband. (Id.)

See Parent and Child.

EASEMENTS.

1. **ENUMERATION OF SERVITUDE IN CIVIL CODE NOT EXCLUSIVE.**—Section 801 of the Civil Code, by its specification of certain kinds of servitudes, does not purport to enumerate all the burdens by way of servitudes that may be attached to land for the benefit of the dominant tenement. (Jersey Farm Company v. Atlanta Realty Company, 412.)
2. **SALE OF PORTION OF LAND SUBJECT TO BURDENS OR BENEFITS—RESULTING EASEMENTS AND SERVITUDES.**—It is a general principle that where the owner of two tenements sells one of them, or the owner of the entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and with all the burdens that appear at the time of the sale to belong to it as between it and the property which the vendor retains. This principle is embodied in section 1104 of the Civil Code, and its application is not limited to the list of servitudes and corresponding easements enumerated in section 801. (Id.)
3. **LAND SUBJECT TO ENTIRE RECLAMATION SYSTEM—SALE OF PORTION INCLUDING MAIN PLANT—EASEMENT IN FAVOR OF REMAINDER OF TRACT—INJUNCTION.**—Where an entire tract of land is subject to a single, complete system of reclamation, of which the surrounding levee, the main drainage canal to which all other drainage canals led, and a pumping plant to eject the surplus waters, are essential parts, and the portion thereof including the main drainage canal and the pumping plant is sold, an easement is created in favor of the remaining portion of the tract to use the parts of the reclamation system situated on the land conveyed in the same manner and to the same extent as the same were used at the time of the transfer. An interference with the use of such easement will be enjoined. (Id.)
4. **TRANSFER BY TRUSTEES UNDER DEED OF TRUST.**—It is immaterial to the creation of such easement, that at the time of the segregation of the land the entire tract was subject to a deed of trust, and that the transfers were executed by the trustees in pursuance of its terms. (Id.)
5. **PRELIMINARY INJUNCTION—RESTRAINING INTERFERENCE WITH USE OF EASEMENT—EVIDENCE LIMITING EFFECT OF QUITCLAIM DEED.**—On an application by the owner of the dominant land for a preliminar-

EASEMENTS (Continued).

ary injunction restraining the owner of the servient land from interfering with the use of such easement, parol evidence is admissible tending to show that a quitclaim deed of the servient land executed by the former to the latter, and which the latter claimed operated as an extinguishment of the easement, was not intended to have that effect. (Id.)

See Water and Water-rights, 14.

EJECTMENT.

1. **MESNE PROFITS—JOINDER OF CLAIMS IN ONE ACTION.**—Whatever may be the right in this state of one out of possession of land to sue for mesne profits alone without setting up possession or the recovery of judgment in ejectment, section 427 of the Code of Civil Procedure authorizes a plaintiff unlawfully dispossessed to unite in the same action a claim "to recover specific real property," with one for "damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same." (Nathan v. Dierssen, 607.)
2. **DEMAND FOR MESNE PROFITS WITHOUT PRIOR POSSESSION OR JUDGMENT IN EJECTMENT.**—Under that section, a demand for mesne profits may be enforced without prior possession or judgment in ejectment when the demand is made in the very action of ejectment itself. (Id.)
3. **ACTION FOR MESNE PROFITS—ALLEGATIONS SHOWING RIGHT OF POSSESSION—ANSWER—JUDGMENT.**—Where a complaint alleges the ownership of land in the plaintiff, that the defendant wrongfully entered and dispossessed him and that he still keeps him out of possession, and also facts essential to a demand for rents and profits, but without praying for restitution of the premises, and the answer takes issue thereon, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issues, and the action may properly be regarded as one for the recovery of possession, as well as for rents and profits. (Id.)
4. **RESTITUTION OF POSSESSION PENDING ACTION—JUDGMENT FOR MESNE PROFITS.**—In such action, the fact that the plaintiff came into possession of the premises after the commencement of the action did not deprive him of his right to a judgment for mesne profits. Such a judgment may be rendered, without a judgment for restitution, or findings establishing the plaintiff's right to restitution. (Id.)
5. **DAMAGES—INTEREST ON MESNE PROFITS.**—The plaintiff is entitled to recover in such action interest on the amount found to be the value of the rents, issues, and profits, from the date of the restitution of the possession to the date of the judgment. (Id.)

EJECTMENT (Continued).

6. **EVIDENCE OF DAMAGES—RENTAL VALUE.**—The damages in such an action may be established either by showing the rents and profits actually received or by proving the rental value of the land. (Id.)
7. **FAILURE TO BRING ACTION TO TRIAL FOR FIVE YEARS—STIPULATION FOR DELAY—DISMISSAL.**—Under section 583 of the Code of Civil Procedure, the failure to bring an action to trial within five years after the answer had been filed will not necessitate its dismissal, if the parties had stipulated in writing for the extension. (Id.)
8. **JUDGMENT AGAINST ESTATE—PAYABLE IN COURSE OF ADMINISTRATION.**—A judgment for mesne profits against the estate of a deceased person should be made payable in due course of administration. (Id.)

ELECTION.

1. **MEMBER OF ASSEMBLY—LEGISLATURE SOLE JUDGE OF QUALIFICATION OF MEMBERS—LAW PROVIDING FOR OFFICIAL BALLOT.**—Under section 7 of article IV of the state constitution, the assembly is made the exclusive judge of the qualifications of its members, and the law providing for an official ballot cannot be held to have changed the intent of the people that such body should be the sole and exclusive judge of the eligibility of those whose election is properly certified. (Allen v. Leland, 56.)
2. **MANDAMUS—INELIGIBILITY OF CANDIDATE—STRIKING NAME FROM OFFICIAL BALLOT.**—A writ of mandate will not lie to compel the county clerk to strike from the official ballot the name of a candidate for member of the assembly, on the ground that he was ineligible for that office by reason of nonresidence. For the court to undertake to try the question of eligibility, and to deprive the candidate of any chance to be elected, would be to usurp the jurisdiction of the assembly. (Id.)
3. **CANDIDATES FOR PRESIDENTIAL ELECTORS—NOMINEES OF REPUBLICAN PARTY—REPUDIATION OF PLATFORM AND CANDIDATES OF NATIONAL PARTY.**—Nominees for electors of president and vice-president of the United States to be voted for at the general election of November 5, 1912, who were nominated as such by a properly constituted convention of the "Republican Party," held at the time and place appointed by law therefor, and composed, as required by the act of 1911 (Stats. 1911, Ex. Sess., p. 83), of the so-called "hold-over" state senators belonging to such party and the nominees of such party for state senator and assemblyman throughout the state, selected at the direct primary election of such party held on September 3, 1912, are the proper candidates of such party for that office, and entitled to have their names appear as such on the official ballot to be used at such general election, notwithstanding the convention which nominated them had repudiated the platform and nominees for president and vice-president of the United States of

ELECTION (Continued).

the National Republican Convention, and had declared its intent to support the national platform and candidates for such offices of a new party known as the Progressive party, and they themselves had been pledged to vote as electors against the nominees of the National Republican party for president and vice-president. (*Sbarboro v. Jordan*, 51.)

4. CONVENTION OF REPUBLICAN PARTY—RIGHT OF MEMBER TO VOTE.—

Assuming the validity of the act of 1911, no qualified member of the convention lost his legal right to participate therein by reason of his attitude or vote on any question coming before the convention, whatever might be his motive therein. (*Id.*)

EMINENT DOMAIN.

1. WATER—PUBLIC USE.—The use of water for sale, rental, and distribution to the public generally is a public use. (*San Joaquin and Kings River Canal and Irrigation Company, Incorporated v. Stevinson*, 221.)

2. POWER TO EXERCISE MUST BE GRANTED.—No person or corporation can exercise the power of eminent domain except by a grant from the state. (*Id.*)

3. WATER MAY BE CONDEMNED FOR PUBLIC USE.—Section 1238 of the Code of Civil Procedure, authorizes the exercise of the right of eminent domain for the condemnation of water to be devoted to such a public use. (*Id.*)

4. PLEADING—LOCATION OF CANALS—PLACE OF USE OF WATER SOUGHT TO BE CONDEMNED—TERRITORY TO BE SERVED.—A complaint to condemn water for public use, which alleges that the plaintiff owns two large canals, one seventy-two miles long and the other fifty-two miles long, leading out of the San Joaquin River into the country lying west of the river and extending from the county of Fresno through the county of Merced into the county of Stanislaus the point of its beginning being described with certainty; that it also has distributing canals leading therefrom to the lands in the vicinity, for convenience of distribution, and maintains a dam in the river to divert the water therefrom into the canals; that by this means it has been diverting water from the river and carrying the same into canals and selling it for irrigation, watering of stock, and domestic uses "to the inhabitants of the counties of Fresno, Merced, and Stanislaus," and that it desires to divert from said river into said canals an additional flow of five hundred cubic feet per second and to carry the same in said canals and devote it to the same public use in the same manner, and that along its canals there is sufficient land upon which irrigation is necessary, the owners of which desire to use said water, to consume said additional quantity, sufficiently shows the situation and location of the canals, the

EMPLOYER AND EMPLOYEE (Continued).

failed to inspect or test the work, or that he was negligent in his inspection or test. It was his duty to inspect and test it and to use due care and skill therein, and the jury might infer from the other facts in evidence either that he did not inspect it at all or that he was negligent in so doing. (Id.)

26. **REFUSAL OF INSTRUCTION NOT HARMLESS ERROR.**—The refusal to give such instruction was not rendered harmless by the giving of an instruction that “the mere fact that some of the work was negligently done does not defeat the plaintiff’s right to compensation. He is still entitled to compensation for the reasonable value of his services, and in determining such reasonable value of his services you may take into consideration the actual amount of damage (if any) which defendant has proved that he has suffered by reason of such negligence.” (Id.)

See Negligence, 6-22.

EQUITABLE ASSIGNMENT. See Assignment, 9, 10.

EQUITY. See Creditor’s Bill; Injunction; Specific Performance.

ESTATES OF DECEASED PERSONS.

1. **PARTIAL DISTRIBUTION—CHOSE IN ACTION IN LITIGATION.**—A chose in action belonging to the estate of a deceased person, which the executors were endeavoring to enforce by a pending action, should not be distributed on a petition for partial distribution in opposition to the wishes of certain of the parties in interest and of the executors. (Estate of Colton, 1.)
2. **CHOSSES IN ACTION SHOULD NOT BE DISTRIBUTED.**—As a statement of fact for the guidance of courts in probate, and not as a proposition of law, it is held that, generally speaking, claims in litigation should not be distributed unless with the full assent of all parties interested and under circumstances where it is apparent to the court that no embarrassment will result to the administrators, or to the administration, in the orderly effort to reduce such a claim to judgment and possession. (Id.)
3. **APPEAL FROM DECREE OF PARTIAL DISTRIBUTION—PARTIES INTERESTED IN ESTATE ARE AGGRIEVED.**—A party possessing an interest in such estate is aggrieved by a decree of partial distribution distributing an undivided interest in such a chose in action to another party, and is entitled to appeal therefrom. (Id.)
4. **EXECUTORS MAY APPEAL FROM DECREE.**—The executors have the right to appeal from any order which is embarrassing to the due administration of the estate, and may appeal from such decree of partial distribution. (Id.)

ESTATES OF DECEASED PERSONS (Continued).

5. **ASSIGNMENT OF INTEREST BY LEGATEE—MONEY COMING TO ASSIGNOR AS "HEIR AT LAW."**—An assignment by a legatee and devisee under a will of certain money "which may be coming to me as an *heir at law of the said . . . deceased, under the terms of his will,*" will be construed as intended to transfer portions of the interest of the assignor as a "beneficiary under the will," coming to her "under the terms of" such will. (Estate of Rankin, 138.)
6. **FOREIGN WILL—RIGHT TO LETTERS OF ADMINISTRATION WITH WILL ANNEXED—PERSONS INTERESTED IN WILL.**—The article of the Code of Civil Procedure containing sections 1323 and 1324 deals especially with the subject matter of foreign wills, and must prevail over all conflicting provisions as to all matters and questions arising out of the subject matter of such article, and under its provisions letters of administration with the will annexed must be granted to a person interested in the will who applies for them, in the absence of a petition for letters by the executor. (Id.)
7. **ASSIGNEE OF NONRESIDENT LEGATEE UNDER FOREIGN WILL—PREFERENTIAL RIGHT TO LETTERS AS AGAINST PUBLIC ADMINISTRATOR.**—An assignee of a nonresident legatee and devisee under a foreign will is a person "interested in the will," within the meaning of section 1323 of the Code of Civil Procedure, and by virtue of that fact alone, if competent to serve as administrator in this state, is entitled to letters of administration with the will annexed, in preference to one who, like the public administrator, is not "interested in the will." It is immaterial, so far as affects the right of the assignee to such letters, that the assignment was made to him without any consideration paid therefor. (Id.)
8. **FINAL SETTLEMENT—NEW ADMINISTRATION WHEN AUTHORIZED.**—After final settlement of the estate of an intestate, the court having probate jurisdiction is not bound to issue further letters of administration and should not do so, unless there still remains property of the estate not fully disposed of, or some act to be done relating thereto which only an administrator can do. This rule is implied by section 1698 of the Code of Civil Procedure, providing that the final settlement of an estate shall not prevent the issuance of further letters of administration thereon, if other property of the estate be discovered, or if good cause appears therefor. (O'Brien v. Nelson, 573.)
9. **ESTATE OF MARRIED WOMAN—PROPERTY TREATED AS COMMUNITY PROPERTY—DISTRIBUTION TO ASSIGNEE OF HUSBAND.**—An administration upon the estate of a married woman dying intestate is not rendered void or ineffectual merely because of the fact that the record therein shows that the court declared that the property as to which administration was had was the community property of the decedent and her surviving husband, and distributed it all to an assignee of the husband. (Id.)

ESTATES OF DECEASED PERSONS (Continued).**10. ERROR IN DISTRIBUTION DOES NOT AUTHORIZE NEW ADMINISTRATION.**

If such property was the separate property of the decedent, that fact would not authorize a new administration thereon. The prior distribution of it as community property would be a mere error, which her heirs could correct only by moving for a new trial, or by taking an appeal from the decree of distribution. In the absence of such proceedings, the decree became final and conclusive upon them. (Id.)

11. FAMILY ALLOWANCE TO WIFE—SEPARATION AGREEMENT—FRAUD OF HUSBAND NOT PLEADED.—Where a wife, who had been living separate and apart from her husband, up to the time of his death, under written articles of separation, applies for a family allowance from his estate, and at the time of filing her petition therefor had knowledge of fraudulent acts of her husband which would nullify the effect of such separation articles as a bar to her receiving such allowance, it was incumbent upon her to have pleaded the fraud. In the absence of such pleading, the agreement remained unimpeached for fraud before the trial court on the application for the allowance, and the rights of the parties were to be adjudicated in accordance with its legal terms and effect. (Estate of Yoell, 540.)**12. SEPARATION AGREEMENT AS DEFENSE TO CLAIM FOR ALLOWANCE—EVIDENCE TO SHOW AND REBUT FRAUD—NECESSITY OF FINDINGS—REVIEW ON APPEAL.—**On such an application, in which the personal representative of the estate sets up the separation agreement as a defense, if it be assumed that the petitioner had the right, under the implied replication allowed by section 462 of the Code of Civil Procedure, to give evidence of the fraud, the representative of the estate would have the right, by way of implied rejoinder, to prove estoppel, a failure to rescind, laches, the statute of limitations, or any other matter of defense. On the new issues so raised, the trial court must make specific findings one way or the other, before a judgment can be entered for an allowance, and before such matters can be reviewed upon appeal. (Id.)**13. HUSBAND AND WIFE—SEPARATION AGREEMENTS NOT AGAINST PUBLIC POLICY.—**Notwithstanding the confidential relations which exist between husband and wife, separation agreements, providing for the division of all the community property of the parties, and obligating each of them not to assert any claim against the estate of the other, are not against public policy, and may be entered into and will be enforced in accordance with their terms when undue advantage has not been taken of either spouse. (Id.)**14. WAIVER OF RIGHT TO FAMILY ALLOWANCE—NO MINOR CHILDREN AT TIME OF APPLICATION.—**A wife may, by the terms of a separation agreement, waive her right to receive a family allowance from

ESTATES OF DECEASED PERSONS (Continued).

the estate of her husband, notwithstanding there were minor children at the time the agreement was executed, if such children had ceased to be minors at the time her application for an allowance was made. (Id.)

15. **PROVISION FOR DEEDS FROM AND TO SPOUSES—INVALID TRUST TO CONVEY LAND—ESTOPPEL TO ASSERT INVALIDITY OF AGREEMENT.**—Where the separation agreement provided, as a mode of establishing title to the real property divided by the spouses, that deeds should be made by them to a third person, who in turn should make to them the deeds contemplated by the agreement, they are estopped to assert the invalidity of the agreement on the ground that it created a void trust to convey land, if they assented to the deeds so made to them, acted under them, and maintained actions in the court to enforce them. (Id.)
16. **INVALIDITY OF MEANS TO CARRY OUT VALID CONTRACT.**—The provision for deeds to and from such third person was a mere means for carrying into effect the principal purposes of the agreement, but was not an integral nor an essential part of it, and after such method was executed and accepted by both parties, the entire contract, in itself valid, will not be permitted to fall because of the supposed invalidity attaching to the means adopted. (Id.)
17. **RIGHT TO FAMILY ALLOWANCE—CONDITIONS ESSENTIAL TO RIGHT.**—Upon the death of the husband the surviving wife may receive a family allowance when and only when she is a member of the family and receiving or entitled to receive support as such member, and when, even though a member of the family, she has not parted with or relinquished her right to make demand for such allowance. (Id.)
18. **WAIVER OF RIGHT TO ALLOWANCE—RENUNCIATION OF CLAIM AS HEIR AND AS SURVIVING WIFE.**—A provision in a separation agreement, by the terms of which the wife renounced and waived all claim which she has or may have against her husband's estate as *heir* of the husband or as his *surviving wife*, is a relinquishment of her right to a family allowance, notwithstanding such right was not renounced *eo nomine*. (Id.)
19. **WIFE CEASING TO BE MEMBER OF HUSBAND'S FAMILY—WANT OF RIGHT TO SUPPORT.**—A wife who has voluntarily and deliberately severed her relationship as a member of her husband's family, and whose right to support by him does not rest upon the family relationship, but upon the terms of articles of separation, is not entitled to a family allowance from his estate. (Id.)
20. **PROBATE COURT MAY CONSTRUE AND ENFORCE SEPARATION AGREEMENT.**—The court in probate, on an application by the surviving wife for a family allowance from her husband's estate, has equitable jurisdiction to pass upon the effect and validity of a separation

EMPLOYER AND EMPLOYEE (Continued).

4. **CONSTRUCTION OF ACT—ELECTION TO BE BOUND BY COMPENSATORY FEATURES OF ACT.**—By the terms of the “Employers’ Liability Act,” its application is, generally speaking, made to depend upon the election of both parties to the contract of employment. In the absence of such mutual agreement the injured employee must have recourse to his claim for damages, or in other words must proceed to enforce the employer’s “liability” as distinguished from the “compensation” which might be due under the act. (Id.)
5. **STATE NOT LIABLE FOR INJURIES TO EMPLOYEES.**—A sovereign state is not bound at all to compensate an individual employee for injuries sustained while in its service, and no right of recovery in favor of such employee exists except by statute. (Id.)
6. **STATUTE PERMITTING STATE TO BE SUED STRICTLY CONSTRUED.**—Statutes permitting the state to be sued are in derogation of its sovereignty and will be strictly construed. The “Employers’ Liability Act” must, therefore, be strictly construed and in such manner, if possible, to preserve to the state its nonliability for injuries to those in its service. (Id.)
7. **SECTION 1970 OF CIVIL CODE—AMENDMENT OF 1907—CONSTITUTIONAL LAW—TITLE OF ACT—SUITS AGAINST EMPLOYER.**—The act of 1907 amending section 1970 of the Civil Code (Stats. 1907, p. 119), the title of which reads “An act to amend section 1970 of the Civil Code of the state of California, relating to the responsibility of employers for injuries to or death of employees,” is not in conflict with section 24 of article IV of the constitution, requiring that every act shall embrace but one subject, which subject must be expressed in its title. The general subject expressed in the title of the act authorizes the inclusion of provisions declaring who may sue the employer for damages resulting from such death. Such details need not be expressed in the title. (Pritchard v. Whitney Estate Company, 564.)
8. **UNIFORM OPERATION OF ACT—GRANT OF SPECIAL PRIVILEGES.**—The fact that the act gives a right of action for damages against an employer in favor of the widow, children, dependent parents, and dependent brothers and sisters of an employee whose death is caused by an injury received from negligence of a fellow-servant, and does not grant such right in favor of the husband, nephews and nieces, or other collateral heirs of the person so killed, does not render the act violative of the constitutional provisions (Const., art. I, secs. 11, 21), requiring general laws to have uniform operation, and forbidding a grant of special privileges to one citizen or class which are not given on the same terms to all. (Id.)
9. **RIGHT OF HEIRS TO SUE FOR INJURY TO ANCESTOR—RIGHT CREATED BY STATUTE.**—A right of action to an heir for an injury to an ancestor does not exist at common law, and is not an inherent right.

EMPLOYER AND EMPLOYEE (Continued).

It exists only so far and in favor of such persons as the legislature may declare. (Id.)

10. **CONSTRUCTION OF CONSTITUTION—LEGISLATURE MAY DETERMINE PERSONS ENTITLED TO SUE—EXCLUSION OF HUSBANDS AND DISTANT COLLATERAL HEIRS.**—Such constitutional provisions were not intended to make it necessary that the legislature, when conferring new rights of action upon particular classes of citizens for injuries not previously actionable, should by the same act declare that all persons who may suffer damages for injuries of that character shall also have such right of action. The decision of the legislature as to how far it will extend the new right is conclusive, unless it appears beyond rational doubt that an arbitrary discrimination between persons or classes similarly situated has been made without any reasonable cause therefor. It cannot be said that there is no reasonable ground for the exclusion of husbands and collateral heirs of the third degree from the benefits of the act. (Id.)
11. **SPECIAL LAW OF NEGLIGENCE AS BETWEEN EMPLOYER AND EMPLOYEE.**—A law establishing rules of liability for negligence applying only to actions arising from the relation between employees and employers does not violate such constitutional provisions, that relation being sufficiently peculiar and distinct from others to warrant legislation for it as a class distinct from other relations. (Id.)
12. **EFFECT OF SECTION 1970 OF CIVIL CODE ON SECTION 377 OF CODE OF CIVIL PROCEDURE.**—The precise extent to which section 1970 of the Civil Code, as amended in 1907, may prevail over the previously enacted section 377 of the Code of Civil Procedure, so far as they authorize actions for injuries causing death, is not determined. The latter section is general, applying to all persons. The former applies only to injuries arising out of the relation of employer and employee. It is held, however, that so far as injuries arising out of that relation are made actionable where death ensues, where they were not actionable before, section 1970 is now the only statute authorizing the action. (Id.)
13. **PURPOSE OF AMENDMENT OF SECTION 1970 OF CIVIL CODE—MODIFICATION OF "FELLOW-SERVANT" DOCTRINE.**—The main purpose of the amendment of 1907 to section 1970 of the Civil Code was the modification of the "fellow-servant" doctrine, whereby the mere pleading and proof that the injury or death was caused by the negligence of a coemployee in the same department of labor with the person injured or killed was available as a defense. (Id.)
14. **DEATH OF EMPLOYEE THROUGH NEGLIGENCE OF FELLOW-SERVANT—ACTION BY PERSONAL REPRESENTATIVE—NO CAUSE OF ACTION ON BEHALF OF NEPHEW.**—Since the enactment of the amendment of 1907 to section 1970 of the Civil Code, where the death of an employee is occasioned through the negligence of a fellow-servant

EMPLOYER AND EMPLOYEE (Continued).

engaged in another department of labor, no cause of action against the employer accrues to the personal representative of the deceased employee on behalf of his nephew, no matter what pecuniary loss said nephew might suffer by reason of his uncle's death. (Id.)

15. **CONSTRUCTION OF AMENDMENT—CAUSE OF ACTION FOR DEATH OF EMPLOYEE—LIMITATION TO SPECIFIED BENEFICIARIES.**—In construing paragraph three of that section, providing that when death results from an injury to an employee *received as aforesaid*, his personal representatives shall have a right of action therefor against the employer, for the benefit of certain enumerated beneficiaries, the words "received as aforesaid" should not be limited to the case of a death occasioned in the manner specified in paragraph two of the section, that is, to one caused by the defective or unsafe condition of machinery or appliances furnished by an employer. So construed, such paragraph, giving such right of action only on behalf of the specified beneficiaries, is applicable to the case of an employee killed through the negligence of a fellow-servant. (Id.)
16. **PRESUMPTIONS—PROMISE TO PAY FOR SERVICES—EVIDENCE TO REBUT—SERVICES INTENDED AS GRATUITOUS.**—Ordinarily the law will imply a promise to pay for services rendered and accepted. This rule is founded on a mere presumption of law, and may be rebutted by proof of a special agreement to pay therefor a particular amount or in a particular manner, or by proof that the services were intended to be gratuitous, or even by particular circumstances from which the law would raise the counter presumption that the services were not intended to be a charge against the party who was benefited thereby. (Gjurich v. Fieg, 429.)
17. **PARTIES LIVING AS HUSBAND AND WIFE—INFERENCE OF GRATUITOUS RETURN OF SERVICES.**—In the absence of an express agreement for compensation, the fact that a man and a woman, although not married to each other, had gone to certain premises belonging to her to live together and for ten years had lived together as husband and wife, mutually carrying on the business of a roadhouse and saloon, is sufficient to support the inference that no compensation in money was contemplated for any services rendered by him in and about the conduct of the business. (Id.)
18. **CROSS-EXAMINATION—EVIDENCE OF COHABITATION.**—In an action by him to recover for such services, after he had testified on his direct examination that he had worked for the defendant under circumstances from which an obligation to pay for his services would be implied, it was proper cross-examination to permit the defendant to inquire concerning his cohabitation with her. (Id.)
19. **INSTRUCTIONS—MATTERS REFERRED TO FOR ILLUSTRATION.**—It was not error for the court, in its instructions to the jury, by way of illustration of some of the circumstances which would justify an inference that services had been rendered gratuitously, to refer to

EMPLOYER AND EMPLOYEE (Continued).

- the case of a son working for a father, or a woman for a supposed husband. (Id.)
20. **PLEADING—DENIAL OF INDEBTEDNESS AND EMPLOYMENT.**—In such action, the mere denial of indebtedness and employment raised an issue, on which, in the absence of an express agreement, the relations of the parties became material, and justified instructions referring to their cohabitation, although such fact had not been pleaded. (Id.)
21. **PAYMENT—SEXUAL INTERCOURSE.**—Where the jury were properly instructed as to the effect of the relations of the parties as tending to show that the plaintiff's services were intended to be gratuitous, it was not error for the court to refuse an instruction, requested by the plaintiff, that sexual intercourse would not constitute payment of plaintiff's claim. (Id.)
22. **EMPLOYMENT OF ARCHITECT—DISMISSAL WITHOUT CAUSE—ENTIRE CONTRACT—ACTION FOR SERVICES ON QUANTUM MERUIT.**—An architect employed to prepare the plans and specifications and to superintend the construction of an entire building, under a contract whereby he was to be paid a certain percentage of its cost, upon being discharged, without cause, by his employer during the term of his employment, may maintain an action upon the *quantum meruit* for the value of the services performed. (Hart v. Buckley, 160.)
23. **DISCHARGE OF EMPLOYEE DURING TERM OF EMPLOYMENT—RESCISION OF CONTRACT.**—It is a general rule that where an employee is, without cause, discharged by his employer during the term of his employment, he may regard the contract as rescinded and sue upon a *quantum meruit* and recover the reasonable value of his services, as if the contract of employment had never been made. (Id.)
24. **DAMAGE RESULTING FROM NEGLIGENCE OF ARCHITECT—COUNTERCLAIM—INSTRUCTIONS.**—In such action by the architect, the employer is entitled, in support of a counterclaim pleaded in his answer, to have the jury instructed that if they should find that the contractor for the building carelessly did certain work in an unworkmanlike manner and not in conformity with the specifications, and that plaintiff carelessly failed to properly inspect or test the work and carelessly certified that it was done properly and as specified, and that this negligence of the plaintiff caused damage to defendant, the damage should be deducted from the value of the plaintiff's services. (Id.)
25. **EVIDENCE—FAILURE OF ARCHITECT TO INSPECT WORK.**—Where the evidence tended to show that the work had not been properly done, and that the plaintiff had certified to its conformity to the contract, the refusal to give such instruction was not justified merely because there was no direct evidence tending to show that the plaintiff had

EMPLOYER AND EMPLOYEE (Continued).

failed to inspect or test the work, or that he was negligent in his inspection or test. It was his duty to inspect and test it and to use due care and skill therein, and the jury might infer from the other facts in evidence either that he did not inspect it at all or that he was negligent in so doing. (Id.)

26. **REFUSAL OF INSTRUCTION NOT HARMLESS ERROR.**—The refusal to give such instruction was not rendered harmless by the giving of an instruction that “the mere fact that some of the work was negligently done does not defeat the plaintiff’s right to compensation. He is still entitled to compensation for the reasonable value of his services, and in determining such reasonable value of his services you may take into consideration the actual amount of damage (if any) which defendant has proved that he has suffered by reason of such negligence.” (Id.)

See Negligence, 6-22.

EQUITABLE ASSIGNMENT. See Assignment, 9, 10.

EQUITY. See Creditor’s Bill; Injunction; Specific Performance.

ESTATES OF DECEASED PERSONS.

1. **PARTIAL DISTRIBUTION—CHOSE IN ACTION IN LITIGATION.**—A chose in action belonging to the estate of a deceased person, which the executors were endeavoring to enforce by a pending action, should not be distributed on a petition for partial distribution in opposition to the wishes of certain of the parties in interest and of the executors. (Estate of Colton, 1.)
2. **CHOSSES IN ACTION SHOULD NOT BE DISTRIBUTED.**—As a statement of fact for the guidance of courts in probate, and not as a proposition of law, it is held that, generally speaking, claims in litigation should not be distributed unless with the full assent of all parties interested and under circumstances where it is apparent to the court that no embarrassment will result to the administrators, or to the administration, in the orderly effort to reduce such a claim to judgment and possession. (Id.)
3. **APPEAL FROM DECREE OF PARTIAL DISTRIBUTION—PARTIES INTERESTED IN ESTATE ARE AGGRIEVED.**—A party possessing an interest in such estate is aggrieved by a decree of partial distribution distributing an undivided interest in such a chose in action to another party, and is entitled to appeal therefrom. (Id.)
4. **EXECUTORS MAY APPEAL FROM DECREE.**—The executors have the right to appeal from any order which is embarrassing to the due administration of the estate, and may appeal from such decree of partial distribution. (Id.)

ESTATES OF DECEASED PERSONS (Continued).

5. **ASSIGNMENT OF INTEREST BY LEGATEE—MONEY COMING TO ASSIGNOR AS "HEIR AT LAW."**—An assignment by a legatee and devisee under a will of certain money "which may be coming to me as an *heir at law of the said . . . deceased, under the terms of his will,*" will be construed as intended to transfer portions of the interest of the assignor as a "beneficiary under the will," coming to her "under the terms of" such will. (Estate of Rankin, 138.)
6. **FOREIGN WILL—RIGHT TO LETTERS OF ADMINISTRATION WITH WILL ANNEXED—PERSONS INTERESTED IN WILL.**—The article of the Code of Civil Procedure containing sections 1323 and 1324 deals especially with the subject matter of foreign wills, and must prevail over all conflicting provisions as to all matters and questions arising out of the subject matter of such article, and under its provisions letters of administration with the will annexed must be granted to a person interested in the will who applies for them, in the absence of a petition for letters by the executor. (Id.)
7. **ASSIGNEE OF NONRESIDENT LEGATEE UNDER FOREIGN WILL—PREFERENTIAL RIGHT TO LETTERS AS AGAINST PUBLIC ADMINISTRATOR.**—An assignee of a nonresident legatee and devisee under a foreign will is a person "interested in the will," within the meaning of section 1323 of the Code of Civil Procedure, and by virtue of that fact alone, if competent to serve as administrator in this state, is entitled to letters of administration with the will annexed, in preference to one who, like the public administrator, is not "interested in the will." It is immaterial, so far as affects the right of the assignee to such letters, that the assignment was made to him without any consideration paid therefor. (Id.)
8. **FINAL SETTLEMENT—NEW ADMINISTRATION WHEN AUTHORIZED.**—After final settlement of the estate of an intestate, the court having probate jurisdiction is not bound to issue further letters of administration and should not do so, unless there still remains property of the estate not fully disposed of, or some act to be done relating thereto which only an administrator can do. This rule is implied by section 1698 of the Code of Civil Procedure, providing that the final settlement of an estate shall not prevent the issuance of further letters of administration thereon, if other property of the estate be discovered, or if good cause appears therefor. (O'Brien v. Nelson, 573.)
9. **ESTATE OF MARRIED WOMAN—PROPERTY TREATED AS COMMUNITY PROPERTY—DISTRIBUTION TO ASSIGNEE OF HUSBAND.**—An administration upon the estate of a married woman dying intestate is not rendered void or ineffectual merely because of the fact that the record therein shows that the court declared that the property as to which administration was had was the community property of the decedent and her surviving husband, and distributed it all to an assignee of the husband. (Id.)

ESTATES OF DECEASED PERSONS (Continued).**10. ERROR IN DISTRIBUTION DOES NOT AUTHORIZE NEW ADMINISTRATION.**

If such property was the separate property of the decedent, that fact would not authorize a new administration thereon. The prior distribution of it as community property would be a mere error, which her heirs could correct only by moving for a new trial, or by taking an appeal from the decree of distribution. In the absence of such proceedings, the decree became final and conclusive upon them. (Id.)

11. FAMILY ALLOWANCE TO WIFE—SEPARATION AGREEMENT—FRAUD OF HUSBAND NOT PLEADED.—Where a wife, who had been living separate and apart from her husband, up to the time of his death, under written articles of separation, applies for a family allowance from his estate, and at the time of filing her petition therefor had knowledge of fraudulent acts of her husband which would nullify the effect of such separation articles as a bar to her receiving such allowance, it was incumbent upon her to have pleaded the fraud. In the absence of such pleading, the agreement remained unimpeached for fraud before the trial court on the application for the allowance, and the rights of the parties were to be adjudicated in accordance with its legal terms and effect. (Estate of Yoell, 540.)**12. SEPARATION AGREEMENT AS DEFENSE TO CLAIM FOR ALLOWANCE—EVIDENCE TO SHOW AND REBUT FRAUD—NECESSITY OF FINDINGS—REVIEW ON APPEAL.—**On such an application, in which the personal representative of the estate sets up the separation agreement as a defense, if it be assumed that the petitioner had the right, under the implied replication allowed by section 462 of the Code of Civil Procedure, to give evidence of the fraud, the representative of the estate would have the right, by way of implied rejoinder, to prove estoppel, a failure to rescind, laches, the statute of limitations, or any other matter of defense. On the new issues so raised, the trial court must make specific findings one way or the other, before a judgment can be entered for an allowance, and before such matters can be reviewed upon appeal. (Id.)**13. HUSBAND AND WIFE—SEPARATION AGREEMENTS NOT AGAINST PUBLIC POLICY.—**Notwithstanding the confidential relations which exist between husband and wife, separation agreements, providing for the division of all the community property of the parties, and obligating each of them not to assert any claim against the estate of the other, are not against public policy, and may be entered into and will be enforced in accordance with their terms when undue advantage has not been taken of either spouse. (Id.)**14. WAIVER OF RIGHT TO FAMILY ALLOWANCE—NO MINOR CHILDREN AT TIME OF APPLICATION.—**A wife may, by the terms of a separation agreement, waive her right to receive a family allowance from

ESTATES OF DECEASED PERSONS (Continued).

the estate of her husband, notwithstanding there were minor children at the time the agreement was executed, if such children had ceased to be minors at the time her application for an allowance was made. (Id.)

15. **PROVISION FOR DEEDS FROM AND TO SPOUSES—INVALID TRUST TO CONVEY LAND—ESTOPPEL TO ASSERT INVALIDITY OF AGREEMENT.**—Where the separation agreement provided, as a mode of establishing title to the real property divided by the spouses, that deeds should be made by them to a third person, who in turn should make to them the deeds contemplated by the agreement, they are estopped to assert the invalidity of the agreement on the ground that it created a void trust to convey land, if they assented to the deeds so made to them, acted under them, and maintained actions in the court to enforce them. (Id.)
16. **INVALIDITY OF MEANS TO CARRY OUT VALID CONTRACT.**—The provision for deeds to and from such third person was a mere means for carrying into effect the principal purposes of the agreement, but was not an integral nor an essential part of it, and after such method was executed and accepted by both parties, the entire contract, in itself valid, will not be permitted to fall because of the supposed invalidity attaching to the means adopted. (Id.)
17. **RIGHT TO FAMILY ALLOWANCE—CONDITIONS ESSENTIAL TO RIGHT.**—Upon the death of the husband the surviving wife may receive a family allowance when and only when she is a member of the family and receiving or entitled to receive support as such member, and when, even though a member of the family, she has not parted with or relinquished her right to make demand for such allowance. (Id.)
18. **WAIVER OF RIGHT TO ALLOWANCE—RENUNCIATION OF CLAIM AS HEIR AND AS SURVIVING WIFE.**—A provision in a separation agreement, by the terms of which the wife renounced and waived all claim which she has or may have against her husband's estate as *heir* of the husband or as his *surviving wife*, is a relinquishment of her right to a family allowance, notwithstanding such right was not renounced *eo nomine*. (Id.)
19. **WIFE CEASING TO BE MEMBER OF HUSBAND'S FAMILY—WANT OF RIGHT TO SUPPORT.**—A wife who has voluntarily and deliberately severed her relationship as a member of her husband's family, and whose right to support by him does not rest upon the family relationship, but upon the terms of articles of separation, is not entitled to a family allowance from his estate. (Id.)
20. **PROBATE COURT MAY CONSTRUE AND ENFORCE SEPARATION AGREEMENT.**—The court in probate, on an application by the surviving wife for a family allowance from her husband's estate, has equitable jurisdiction to pass upon the effect and validity of a separation

ESTATES OF DECEASED PERSONS (Continued).

agreement, which has been interposed as a defense by way of estoppel to her claim. (Id.)

21. **FAMILY ALLOWANCE—AMOUNT OF TEMPORARY ALLOWANCE—DISCRETION—APPEAL.**—In determining the amount of the temporary family allowance required by section 1464 of the Code of Civil Procedure to be paid to a surviving wife from the estate of her husband until the return of the inventory, much is left to the discretion of the judge to whom the application is made, and his action will not be disturbed on appeal unless it clearly appears that the discretion has been improperly exercised. In the present case, where the estate was valued at about a million dollars, and was not indebted, it is held that a temporary allowance of one thousand five hundred dollars per month for the sole support of the decedent's widow was not an abuse of discretion. (Estate of Cowell, 636.)
22. **WIDOW HAVING OTHER MEANS OF SUPPORT—BEQUESTS TO WIDOW BY HUSBAND—WIDOW NOT PUT TO ELECTION.**—Under the statutes of this state, the fact that a widow has property of her own or other means of subsistence, or is given bequests or devises by the will of her husband, not putting her to an election, in no way affects her right to such a temporary allowance from his estate as is reasonably necessary for her support. And the same is true as to her right to an allowance, under section 1466 of the Code of Civil Procedure, after the return of the inventory. (Id.)
23. **HUSBAND CANNOT DEPRIVE WIDOW OF RIGHT TO FAMILY ALLOWANCE—WIDOW PUT TO ELECTION.**—It is not within the power of the husband by any provision of his will to deprive the widow of her right to a family allowance from his estate under the statutes, or in any wise to limit the power of the court in the exercise of its proper discretion to fix the amount to be allowed. He may, however, so frame his will that she cannot have the benefits thereby given her and those of the statutes also, and she will then be put to her election which she will take. (Id.)
24. **LANGUAGE OF WILL NECESSITATING ELECTION.**—To put the wife to such an election, it is not necessary that the husband's will should contain an express declaration to that effect. It is sufficient that it should clearly appear from the language of the will that such was his intention. In the absence of such an express declaration there is no presumption of an intention on the part of the testator to put the widow to her election. To accomplish this result it must clearly and unequivocally appear that the provision made by the will was intended to be in lieu of such rights as are given by the law. (Id.)
25. **CONSTRUCTION OF WILL IN QUESTION—ELECTION NOT NECESSARY.**—The testator, whose estate was valued at about one million dollars, the greater part of which consisted of stock in various manufactur-

ESTATES OF DECEASED PERSONS (Continued).

ing corporations in which he and his brother and sisters owned all the stock, by his will directed that his interest in such corporations should be converted into cash within seven years, and that in the mean time "the properties" should pay his wife the sum of one thousand dollars a month, and at the end of that period she should receive the income from two hundred and fifty thousand dollars during her life. At her death said sum was to be paid to the regents of the University of California, to whom a legacy of five hundred thousand dollars was also given "as soon as the money became available." After certain minor bequests, to pay which he directed that so much of his interest in such corporations as was necessary should be sold within one year, he further provided, in order that the affairs of such corporations might not be interfered with, that if all the bequests were paid within the seven years, it would not be necessary to sell any more of his interests, and that whatever remained after paying "these bequests and final settlement" should become the property of his brother and sisters. In the event that none of them survived, the residue was left to such regents for specified purposes. *Held*, that there was nothing in the will inconsistent with the right of the widow to receive a family allowance and that she was not put to an election. (Id.)

26. **ABSENCE OF WITNESS—REFUSAL OF CONTINUANCE.**—It was not prejudicially erroneous to refuse to continue the hearing of the widow's application for a family allowance, on account of the absence of a witness for the estate, if the substance of the testimony expected to be elicited from him was given by another witness. (Id.)

See Adoption; Divorce, 2; Ejectment, 8; Homestead, 2-4; Inheritance Tax; Negligence, 16-22; Statute of Limitations, 12, 13; Will.

ESTOPPEL. See Assignment, 6; Boundary, 1; Corporations, 4; Estate of Deceased Persons, 15; Lease, 4, 9; Mortgage, 7; Schools, 5; Toll-bridge, 8.

EVIDENCE.

1. **EVIDENCE OFFERED BY APPELLANT.**—An appellant cannot complain of the admission of evidence which was offered by himself. (*Gjurich v. Fieg*, 429.)
2. **REMARK OF COURT—EFFECT OF EVIDENCE.**—A remark made by the court, as to his recollection of the effect of certain findings in another action that were subsequently offered in evidence, is without prejudice, if the findings themselves showed that the court's recollection was accurate. (Id.)
3. **EXCLUSION OF TESTIMONY AS TO CONVERSATION—REVIEW OF RULING—SUBSTANCE OF CONVERSATION NOT SHOWN.**—In an action

EVIDENCE (Continued).

to recover the amount due on promissory notes, which was defended on the ground of want of consideration, where a witness for the defendant had testified that he had a conversation with the payee of the notes, the refusal of the court to permit the witness to state what the conversation was, on the ground that it was immaterial, irrelevant, and incompetent, cannot be deemed erroneous or in itself constituting ground for reversal, in the absence of any statement made to the trial court showing what the defendant claimed the substance of the conversation to be. (Snowball v. Snowball, 476.)

See Agency, 1; Appeal, 1-5; Community Property; Consideration, 2; Corporations, 6; Criminal Law, 4-9, 12-19, 23; Easements, 5; Ejectment, 6; Employer and Employee, 1, 2, 18, 25; Mortgage, 1-3; Negligence, 1, 3, 4, 12, 14; New Trial, 1; Promissory Note, 1; Taxation, 3; Vendor and Vendee, 8; Will, 7-11, 13, 20, 21, 22, 25-30, 35, 39.

EXCHANGE. See Brokers; Rescission.

EXECUTION. See Assignment, 2, 3; Creditor's Bill.

EXECUTORS AND ADMINISTRATORS. See Estates of Deceased Persons; Negligence, 16-22.

FINDINGS.

1. **FINDING THAT ALLEGATIONS OF FACT ARE TRUE—LEGAL CONCLUSIONS NOT FOUND.**—A finding that the allegations of fact in a complaint are true, is not a finding that any conclusions of law therein are true. (Postal Telegraph-Cable Co. v. City of Los Angeles, 156.)
2. **APPEAL—ERRONEOUS FINDING WITHOUT PREJUDICE IF DISREGARDED BY JUDGMENT.**—Any error in finding against an appellant on a particular issue is without prejudice to him, if the judgment gave him all relief to which he was entitled had the finding been in his favor. (Pugh v. Moxley, 374.)

See Appeal, 9; Creditor's Bill, 5-7; Deed of Trust, 2; Estates of Deceased Persons, 12.

FORFEITURE. See Corporations; Vendor and Vendee, 1-11.

FRANCHISE. See Taxation, 13-21; Toll-bridge.

FRAUD.

1. **NECESSITY OF PLEADING.**—Fraud is not presumed, and whenever it constitutes an element of a cause of action which is of an affirmative nature or is invoked as conferring a right, it must be alleged. (Estate of Yoell, 540.)

FRAUD (Continued).

2. **DECEIT—FRAUDULENT REPRESENTATIONS TO WIFE CAUSING SEPARATION FROM HUSBAND.**—Where the separation of a husband and wife was the result of her cruel treatment of him, and the sole cause of her conduct was the action of a third person in making to her willfully false representations concerning her husband, for the very purpose and with the design on his part to so influence her as to bring about such a separation, the wife may maintain an action against the person making the false representations to recover damages occasioned her as the result of the separation. (*Work v. Campbell*, 343.)
3. **WHEN ACTION FOR DECEIT WILL LIE.**—As a general rule, an action for damages for deceit will lie wherever a party has made a false representation of a material fact susceptible of knowledge, knowing it to be false or not having sufficient knowledge on the subject to warrant the representation, with the intent to induce the person to whom it is made, in reliance upon it, to do or refrain from doing something to his pecuniary hurt, when such person, acting with reasonable prudence, is thereby deceived and induced to so do or refrain, to his damage. (*Id.*)
4. **CONDUCT OF PLAINTIFF DIRECT CAUSE OF RESULT OCCASIONING DAMAGE.**—It is no answer to such an action that the action or conduct of the plaintiff is the direct cause of the result occasioning damages. The whole basis of the action is that such act or conduct was fraudulently induced by the defendant. (*Id.*)
5. **CONDUCT VIOLATIVE OF GOOD MORALS OR PUBLIC POLICY.**—Under the circumstances alleged in the complaint, it is held that the harsh and cruel conduct of the wife toward her husband, so fraudulently induced and causing their separation, was not so violative of good morals or public policy as to defeat her right to action. (*Id.*)
6. **HUSBAND NECESSARY PARTY PLAINTIFF—FAILURE TO JOIN—WAIVER OF NONJOINER—DEMURRER.**—Notwithstanding the complaint in such action shows upon its face that the plaintiff is a married woman and that she and her husband are not living separate and apart by reason of his desertion of her, and that the husband was a necessary party plaintiff, and that any damages recovered therein would be community property, the failure to join him as such a party is waived, unless objection to his nonjoinder is specially taken by demurrer. (*Id.*)

See *Brokers*, 3; *Creditor's Bill*; *Deed of Trust*, 1-4; *Estates of Deceased Persons*, 11, 12.

GRANTOR AND GRANTEE. See *Boundary*; *Deed*; *Vendor and Vendee*.

GUARANTY.

1. **PAYMENT OF NOTES—ABSOLUTE AND UNCONDITIONAL GUARANTY.**—Under a guaranty of the payment of promissory notes, "with

GUARANTY (Continued).

all costs of collection, including reasonable attorneys' fees," the latter words are words of extension rather than of limitation, and in no degree imply that the guaranty was to be effective only in the event that the holder of the note was unable to collect from the maker. Such a guaranty is an absolute and unconditional guaranty of payment of the notes. (Cooke v. Mesmer, 332.)

2. **ACTION ON GUARANTY—INDEPENDENT CONTRACT.**—An action on such a guaranty is one upon an independent contract of the guarantor, with which the principal debtor has nothing to do. (Id.)
3. **PLEDGE OF NOTES AFTER MATURITY—ABSENCE OF NOTICE BY PLEDGEE—GUARANTY OF PAYMENT—ESTOPPEL OF GUARANTORS TO LIMIT LIABILITY OF MAKERS.**—Where such notes were pledged to the bank after maturity, and were taken by it without notice of any fact not appearing on their face, on the faith of a representation by the payees of their enforceability against the makers to the full amount apparently due thereon, and at the time of the pledge their payment in full accord with their terms was absolutely and unconditionally guaranteed by the payees, the latter, in an action against them to enforce the guaranty, are estopped from asserting any defense tending to reduce the apparent liability on the part of the makers, and as guarantors are liable for the full amount of the notes. (Id.)
4. **OBLIGATION OF GUARANTORS NOT LIMITED BY EXTENT OF OBLIGATION OF MAKERS.**—Under such circumstances, section 2809 of the Civil Code, providing that "the obligation of a guarantor must be neither larger in amount nor in other respects more burdensome than that of the principal, and if in its terms it exceeds it, it is reducible in proportion to the principal obligation," is inapplicable to relieve the guarantors from the necessity of paying anything on their guaranty that the makers could not be compelled to pay on their notes. (Id.)
5. **CONSIDERATION OF GUARANTY—LOAN TO PRINCIPAL OF GUARANTOR.**—The loan of money to a principal is sufficient consideration to support a contract by his agent guaranteeing the payment of notes pledged to secure the loan. (Id.)
6. **GUARANTY NOT MERELY OF COLLECTION—NOTES PAST DUE WHEN PLEDGED.**—The fact that such notes were past due when pledged to the bank does not compel the construction that such guaranty was one merely of collection, rather than an absolute and unconditional guaranty of payment. (Id.)
7. **GUARANTY INDORSED ON NOTE—TIME OF PLEDGE DEEMED TIME OF MAKING GUARANTY.**—Where a promissory note, bearing on its back an indorsement guaranteeing its payment by the parties named therein as payees, is pledged with a bank as collateral security, the guaranty, so far as the pledgee is concerned, must be deemed to have been made when the note was delivered to it. (Id.)

GUARANTY (Continued).

8. **EFFORT TO COLLECT FROM MAKERS OF NOTE NOT ESSENTIAL.**—If such guaranty was an absolute and unconditional guaranty of payment, no effort to collect from the makers was essential as a prerequisite to liability on the part of the guarantors. (Id.)
9. **GUARANTY OF COSTS OF COLLECTING NOTE AND ATTORNEYS' FEES—ATTORNEYS' FEES IN ACTION ON GUARANTY NOT INCLUDED.**—Under a guaranty reading "I guarantee the payment of this note, with all costs of collection, including reasonable attorneys fees," the attorneys' fees therein referred to are only such as may be expended in attempting to collect the note, and do not include any fee that may be paid in a suit on the guaranty. (Id.)

HABEAS CORPUS.

1. **SUPREME COURT CANNOT TRANSFER PROCEEDING AFTER DECISION OF DISTRICT COURT OF APPEAL.**—The supreme court, after the decision of the district court of appeal in a *habeas corpus* proceeding, has no power to transfer such proceeding to the supreme court for a hearing therein. (Matter of Zany, 724.)
2. **CONCURRENT POWERS OF SUPERIOR AND SUPREME COURTS IN HABEAS CORPUS.**—Prior to the establishment of the district court of appeal it had always been, and it now is, the law in this state that the decision of any court in a *habeas corpus* proceeding, provided the court has jurisdiction, cannot be reviewed by any other court in any way. The right of appeal has never been given, and no other method for such review has ever been provided. With reference to such proceedings, the supreme and superior courts, to each of which was given the power to issue writs of *habeas corpus*, stood upon the same plane, neither being inferior to the other in any other sense than that a superior court in determining any such matter would naturally follow a precedent established by the highest court in the state, if any such precedent had been established. It, however, had the power to disregard it, and its determination, whether in accord with the law as laid down by the supreme court or not, was an end of the particular proceeding, and in case of the discharge of the petitioner from custody was final and conclusive. (Id.)
3. **CONSTITUTIONAL GRANT OF POWER TO DISTRICT COURTS OF APPEAL.**—The power given by the constitution to the district courts of appeal to issue writs of *habeas corpus* is conferred in practically the same language as is used with reference to superior courts and the supreme court, and the language used must be taken as indicating the intention to confer the same power that had already been given to the superior and the supreme courts, with all the incidents thereof. (Id.)

HABEAS CORPUS (Continued).

4. CONSTRUCTION OF CONSTITUTION—PROVISION GIVING SUPREME COURT THE APPELLATE JURISDICTION OF DISTRICT COURT OF APPEAL. The provision of the constitution that the supreme court “shall also have appellate jurisdiction in all cases, matters and proceedings pending before a district court of appeal which shall be ordered by the supreme court to be transferred to itself for hearing and decision as hereinafter provided,” was not designed to create a right of appeal in any matter, or to give appellate jurisdiction to the supreme court in any matter where no right of appeal was given by some other provision of law. Its whole design was to give to the supreme court the *appellate jurisdiction of the district court of appeal* in any case, matter or proceeding, which might be legally transferred from such district court of appeal to the supreme court. (Id.)
5. POWER TO TRANSFER PENDING CAUSE.—The provision of the constitution, that “the supreme court shall have power . . . to order any cause pending before a district court of appeal to be heard and determined by the supreme court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within thirty days after such judgment shall have become final therein. The judgments of the district courts of appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced,” is inapplicable to *habeas corpus* proceedings. (Id.)
6. MEANING OF PHRASE “ANY CAUSE PENDING.”—The words “any cause pending” used in that provision may reasonably be construed, in the connection in which they are used, as not intending to include and as not including any matter, such as a *habeas corpus* proceeding, as to which the well settled law excludes the idea of any right of review, except where there is a lack of jurisdiction. At any rate, the power of the supreme court to order a transfer is expressly limited to “any cause *pending* before a district court of appeal.” A *habeas corpus* proceeding cannot fairly be said to be so “pending” at any time after judgment by such court. Such a proceeding is finally and definitely ended by the judgment, and if the petitioner be ordered discharged thereby, he is at once restored to liberty. (Id.)

HIGH SCHOOLS. See Schools.

HIGHWAYS. See Streets, Roads, and Highways.

HOMESTEAD.

1. PROPERTY OWNED BY HUSBAND AND WIFE IN JOINT OR COMMON TENANCY.—A valid homestead may be selected or claimed on land

HOMESTEAD, (Continued).

which is owned in joint or common tenancy by a husband and wife. (Sewell v. Price, 265.)

2. **ESTATES OF DECEASED PERSONS—HOMESTEAD FROM SEPARATE PROPERTY MUST BE FOR LIMITED PERIOD.**—Under section 1468 of the Code of Civil Procedure, as amended in 1881, where no homestead has been selected during the lifetime of the decedent, the court in probate, in setting apart a homestead from the separate property of the decedent can set it apart for a limited period only. (Estate of Niccolls, 368.)
3. **ORDER SETTING APART HOMESTEAD ABSOLUTELY—ERRONEOUS FINDING OF COMMUNITY PROPERTY—EVIDENCE OF SEPARATE PROPERTY OF WIFE.**—An order in probate setting apart a homestead to and vesting it absolutely in the surviving wife of the decedent, which is based on an erroneous finding that the property set apart was community property, cannot be upheld on the theory that the evidence showed that the property was the separate property of the wife. (Id.)
4. **PROCEEDING TO SET APART HOMESTEAD—JURISDICTION—TITLE AND ADVERSE CLAIMS NOT INVOLVED.**—In a proceeding to set apart a homestead from the estate of a decedent, the court has no jurisdiction to determine the title to the property, or the validity of any claim of title adverse to that of the estate. Such a proceeding is based on the theory that the property sought to be set aside is a part of the estate of the decedent, and any title the applicant might claim in it as separate property is not involved and cannot be adjudicated. (Id.)

HUSBAND AND WIFE. See Community Property; Divorce; Employer and Employee, 17; Estates of Deceased Persons, 11-20; Fraud, 2-6; Homestead; Parties.

INHERITANCE TAX.

1. **ESTATES OF DECEASED PERSONS—RESIDUE OF ESTATE OF TESTATOR.**—The residue of the estate of a person dying testate is that which remains after paying the legacies of the will and the debts and expenses of administration. (McDougald v. Low, 107.)
2. **NONRESIDENT TESTATOR—PROPERTY SITUATED IN THIS STATE—DETERMINATION OF VALUE OF PROPERTY PASSING IN KIND—NO DEDUCTION FOR FOREIGN DEBTS OR EXPENSES.**—In determining the value, for the purpose of fixing the amount of the inheritance tax payable in this state, of property having its *situs* therein which passed in kind to the residuary legatees under the will of a nonresident testator, who left no creditors in this state, and whose estate in the state of his domicile is ample to pay all debts and expenses of its administration, no deduction should be made from the actual value

INHERITANCE TAX (Continued).

- of the property of any portion of the debts proved, or expenses incurred in the state of the testator's domicile. (Id.)
3. **CHARGE UPON SUCCESSION.**—The inheritance tax is a charge upon succession by inheritance or transfer by will. (Id.)
4. **SITUS OF CORPORATE STOCK IS IN STATE OF INCORPORATION.**—The situs of stock in a corporation is in the state of the incorporation, for the purposes at least of the inheritance tax law, and any bequest thereof which results in its actual transfer in kind should subject it to payment of the inheritance tax upon its actual value. (Id.)
5. **PROCEEDING FOR COLLECTION OF INHERITANCE TAX—FINDINGS—PAYMENT OF DEBTS AND EXPENSES FROM ASSETS IN STATE OF DOMICILE.**—In a proceeding in this state to enforce the payment of the inheritance tax on such property, findings showing that the value of the assets of the estate situated in the state of the testator's domicile was vastly greater than the aggregate amount of the debts and expenses there proven and incurred, justify the conclusion that such debts and expenses had been or would be paid out of the domiciliary assets, and that the property having its situs in this state had passed or would pass in kind and without diminution to the residuary legatees. (Id.)
6. **TRANSFER UNDER POWER OF APPOINTMENT—BOND TO SECURE PAYMENT OF TAX.**—Where property is bequeathed to trustees, to pay the net income therefrom to a daughter of the testator, with power to said daughter to will such property to whomsoever she might wish after her death, no transfer under the power takes place, within the meaning of the inheritance tax law, until the exercise thereof, and the trustees are not required to give a bond to secure the payment of such tax as may accrue upon the exercise of the power. (Id.)

INJUNCTION. See Easements, 3, 5.

INSOLVENCY. See Building and Loan Associations.

INSTRUCTIONS. See Corporations, 15; Criminal Law, 10, 11, 20-24; Employer and Employee, 19, 24, 26; Negligence, 2-9.

INSURANCE.

1. **LIFE INSURANCE—DATE OF ISSUANCE OF POLICY—EXEMPTION FROM LIABILITY FOR SUICIDE WITHIN ONE YEAR.**—A condition in a policy of life insurance, providing that the insurance company shall not be liable in the event of the insured's death by his own act during the period of one year after the "issuance of this policy," does not exempt the company for a death by suicide occurring less than one

INSURANCE (Continued).

year after the day when the policy was in fact signed by the officers of the company, but more than one year after the day designated in the policy as its date, where it appears from other provisions of the policy, read in connection with the application for insurance which was made a part of the contract, that the latter date was intended to be and was adopted by both parties as the day when the risk attached. (*Anderson v. Mutual Life Insurance Company of New York*, 712.)

2. **CONSTRUCTION OF WRITING—USUAL MEANING OF WORD MAY BE DISREGARDED.**—In construing any writing, the usual definition of a single word is not a conclusive test of the meaning to be attributed to it in the connection in which it is found. The sense in which the parties employed the particular word or phrase in question must be ascertained from an examination of the entire instrument, read in the light of the circumstances surrounding its execution. (*Id.*)

INTEREST. See Ejectment, 5; School District, 2; Vendor and Vendee, 26.

JOINDER OF CAUSES OF ACTION. See Ejectment, 1.

JUDGMENT. See Appeal, 1-5, 9; Corporations, 1, 3; Creditor's Bill; Divorce; Ejectment, 2-4, 8; Findings, 2; Justice's Court, 5; Parent and Child, 2; Rescission, 1.

JUDICIAL NOTICE.

RECORDS IN DIFFERENT ACTIONS.—Courts cannot in one case take judicial notice of their records in another and different case. The rule that they may take judicial notice of their own records is limited to proceedings in the same case. (*Sewell v. Price*, 265.)

See Eminent Domain, 11.

JURISDICTION. See Justice's Court, 1, 2; Office and Officers, 2.

JURY AND JURORS.

1. **JURY TRIAL—RULE OF COURT—WAIVER BY FAILURE TO DEMAND AT CALLING OF TRIAL CALENDAR.**—Notwithstanding a rule of the superior court to the contrary, a party to an action in which a jury trial is a constitutional right, does not waive such right by failing to demand a jury at the calling of the trial calendar, when the cause was answered "ready" and set for a subsequent day for trial. (*People v. Metropolitan Surety Company*, 174.)
2. **CONSTITUTIONAL RIGHT TO JURY TRIAL—LEGISLATURE ONLY CAN PRESCRIBE WHAT CONSTITUTES WAIVER.**—The legislature, by virtue of the provision of section 7 of article I of the constitution, that

JURY AND JURORS (Continued).

a jury trial may be waived in civil cases "by the consent of the parties, signified in such manner as may be prescribed by law," is given the sole power of declaring what shall constitute a waiver of trial by jury, and has exercised its power by the enactment of section 631 of the Code of Civil Procedure. A jury may be waived only in one of the three modes prescribed by that section. (Id.)

3. **RULE REQUIRING DEPOSIT OF JURY FEES.**—The cases holding that, notwithstanding the provisions of section 631 of that code, the court may make reasonable rules regulating the right of a party to claim a jury trial, and that such trial may be properly refused when there has been a failure to comply with such rules, go no further than to uphold a rule requiring the deposit of jury fees as a condition to the insistence upon the right. (Id.)
4. **JURY NOT WAIVED BY IMPLICATION—CONSTRUCTION OF RULE.**—The right to a jury trial should not be held waived by implication; and, if the validity be admitted of a rule of court that "upon the calling of the trial calendar, in all cases answered 'ready,' the parties shall announce whether a jury is required, and shall at such time demand a jury, if desired, and if no jury is demanded at such calling it shall be deemed to be waived and a waiver of a jury will thereupon be entered on the minutes by the clerk," no waiver thereunder takes place, unless the cause was answered "ready" at the calling of the trial calendar, and an entry of the waiver was made in the minutes. (Id.)
5. **JURY TRIAL—PRACTICE—DIRECTING VERDICT FOR DEFENDANT.**—On a trial by jury, it is proper for the court, after the evidence on the part of the plaintiff was closed, to direct a verdict for the defendant, where the evidence is such that if the case had been allowed to go to the jury, and it had found in favor of the plaintiff, the court would have been compelled, on motion to that effect, to set aside the verdict and grant a new trial, on the ground of insufficiency of evidence to sustain the verdict. (Champion Gold Mining Co. v. The Champion Mines, 205.)

JUSTICE'S COURT.

1. **INSUFFICIENT SERVICE OF SUMMONS—JUDGMENT BY DEFAULT AGAINST FOREIGN CORPORATION—AFFIRMANCE ON APPEAL—CERTIORARI.**—A foreign corporation, against whom a judgment by default had been rendered in a justice's court, on an alleged insufficient substituted service of summons on the secretary of state, by appealing to the superior court submitted the question of the want of jurisdiction of the justice's court of its person to the superior court, and the latter court had the power to decide that question incorrectly as well as correctly. After its affirmance by the superior court, the judgment of the justice's court is no longer

JUSTICE'S COURT (Continued).

subject to review on *certiorari*. An attack in such a proceeding must be confined to the jurisdiction of the superior court over the person of the petitioner. (*American Law Book Company v. Superior Court*, 327.)

2. **SUPERIOR COURT ACQUIRES JURISDICTION OF PERSON ON APPELLANT—POWER TO HEAR AND DETERMINE APPEAL.**—An appeal to the superior court, although not the exclusive remedy, is one method and an appropriate manner of attacking the jurisdiction of the justice's court, and such defendant, by appealing to the superior court from the judgment of the justice's court, submitted its person to the jurisdiction of the superior court, and cannot afterward by *certiorari* question the power of that court to hear and determine the appeal. (*Id.*)
3. **PLEADINGS OF DEFENDANT—CROSS-COMPLAINT NOT AUTHORIZED.**—No such pleading as a cross-complaint is provided for among the pleadings available to a defendant in an action in a justice's court. Under section 852 of the Code of Civil Procedure, the only pleadings available to a defendant are a demurrer or answer to the complaint. (*Purcell v. Richardson*, 150.)
4. **CROSS-COMPLAINT LIMITED TO ACTIONS IN SUPERIOR COURT.**—The provisions of section 442 of the Code of Civil Procedure, specifically providing for a cross-complaint in actions in the superior court, are not applicable to actions in a justice's court. That code, having particularly designated of what the pleadings in such court shall consist and what they shall contain, is conclusive on the subject. (*Id.*)
5. **ANSWER SETTING UP NEW MATTER AS COUNTERCLAIM—ABSENCE OF NOTICE OF TRIAL—VOID JUDGMENT.**—A pleading of the defendant, setting up new matter by way of counterclaim, as provided by section 855 of that code, was simply an answer, which when filed raised an issue of fact to be tried under notice given by the justice to the respective parties to the action. The justice was without jurisdiction to enter any judgment at all until after such notice of the trial had been given, and, in the absence of such notice, an attempted judgment entered by him against the plaintiff and in favor of the defendant, on the new matter pleaded as a counterclaim, was void. (*Id.*)

LACHES.

1. **DEFENSE NEED NOT BE PLEADED—DENIAL OF DEFENDANT'S MOTION FOR JUDGMENT.**—The defense of laches need not be pleaded, but when it appears from the evidence that the seeker of relief in equity has been guilty of laches, the court will deny such relief *sua sponte* without any pleading. The denial of defendant's motion for judgment on the ground of laches amounts to a declaration and
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LACHES (Continued).

finding to the effect that the plaintiff was not guilty of laches. (Suhr v. Lauterbach, 591.)

2. **STATUTE OF LIMITATIONS—ELEMENTS CONSTITUTING LACHES.**—Entirely independent of any statutory period of limitations, stale demands will not be aided in equity where the claimant has slept upon his rights for so long a time and under such circumstances as to make it inequitable to enter upon an inquiry as to the validity thereof, or to allow the remedy sought. Where such is the condition, the demand is, in a court of equity, barred by laches. Unless such conditions exist, the demand is not so barred. (Id.)
3. **QUESTION OF LACHES PRIMARILY FOR TRIAL COURT.**—Whether such is the situation is a question in the first instance for the trial court, and if its conclusion thereon can reasonably be held to find sufficient support in the evidence, an appellate court should not interfere therewith. (Id.)
4. **CANCELLATION OF DEED—EVIDENCE INSUFFICIENT TO ESTABLISH LACHES.**—In an action to set aside a deed executed by the plaintiff to her brother-in-law, on the ground that its execution was procured by means of duress and undue influence exercised by him upon her, it is held, upon a review of the evidence, that the trial court was justified in its conclusion that the defendant could not have been prejudiced by the plaintiff's delay of a year and nine and one-half months in commencing the action, and that the plaintiff was not guilty of laches. (Id.)
5. **RATIFICATION OF DEED—TAKING AND RECORDING CONTEMPORANEOUS INSTRUMENT.**—The mere taking and recordation by such plaintiff of an instrument executed by the defendant practically contemporaneously with the deed and as part of the same transaction, whereby the defendant undertook, in conjunction with the plaintiff, to execute a note secured by a mortgage of the granted premises, if the same became necessary to raise money for the plaintiff's support, did not amount to a subsequent ratification of the deed. (Id.)

See Assignment, 6; Contract, 7; Deed, 15; Mortgage, 6; Vendor and Vendee, 23, 29.

LAND. See Ejectment; Public Land; Street Assessment, 7; Tide Land.

LANDLORD AND TENANT.

1. **ORAL WAIVER BY AGENT OF NOTICE TO INCREASE RENT.**—After the service on a tenant from month to month of a written notice of an increase of rent, an agent of the landlord, having the actual or ostensible power so to do, may waive the increase by a parol agreement with the tenant, and the landlord is bound by the waiver. (Alden v. Mayfield, 6.)

LANDLORD AND TENANT (Continued).

2. **NOTICE TO QUIT—WAIVER OF NOTICE BY AGENT OF LANDLORD—REVOCATION OF AGENT'S AUTHORITY—ACTS CONSTITUTING WAIVER UNKNOWN TO LANDLORD.**—Such a tenant, after the service on him of a formal notice to quit and surrender possession of the leased premises, cannot justify his subsequent withholding of the possession because of an asserted waiver of the notice to quit by an agent of the landlord, if he knew at the time of the performance of the acts claimed to constitute the waiver, that the agent's authority in the matter had been revoked, and the performance of such acts were unknown to the landlord. (Id.)
3. **TENANCY FROM MONTH TO MONTH—INTERFERENCE WITH TENANCY—LOSS OF PROFITS.**—A tenant under a tenancy from month to month is as much entitled to damages for an illegal interference with his tenancy as is any other tenant, and in proper cases damages may be predicated upon a loss of prospective profits. (Id.)

See Lease.

LEASE.

1. **CONSTRUCTION OF INSTRUMENT—LEASE OR EXECUTORY CONTRACT FOR LEASE—INTENT—PART PAYMENT OF RENT.**—Whether a written instrument is a lease, or a mere executory agreement to make a lease, depends upon the intent of the parties, to be determined by a construction of the instrument taken as a whole. So construing the instrument in question, it is held, that it was intended to constitute a lease when signed by the respective parties, especially in view of the fact that the lessee entered under it and paid part of the rent at the time of its execution. (Pacific Improvement Co. v. Jones, 260.)
2. **RECORDING ASSIGNMENT OF UNRECORDED LEASE—NOTICE OF LEASE.**—Where there had been several assignments of an unrecorded lease, the recordation of one of the intermediate assignments, the parties thereto being strangers to the record title, did not give notice of the contents of the lease. (Standard Oil Company v. Slye, 435.)
3. **OCCUPATION BY SUBLESSEE—CONSTRUCTIVE NOTICE OF TERMS OF SUBLEASE.**—The open and notorious occupancy of oil lands by a sublessee thereof, claiming under a prior sublessee, is in itself sufficient to put on inquiry a corporation which subsequently purchased the land from the lessor and became the assignee of the rights of the intermediate lessees, and to charge it with constructive notice of the terms of the occupant's sublease. (Id.)
4. **ATTEMPT TO ACQUIRE INTEREST OF SUBLESSEE—ESTOPPEL—KNOWLEDGE OF RIGHTS.**—The fact that such corporation, almost contemporaneously with the assignment of the leasehold interest of the sublessee under whom such occupant claimed, endeavored to acquire his rights, does not operate to estop it from disputing such rights,

LEASE (Continued).

but is evidence tending to show that it had actual knowledge of the terms of the occupant's sublease. (Id.)

5. **COVENANT FOR RENEWAL RUNS WITH LAND.**—A covenant in a lease for a renewal thereof is for the direct benefit of the estate granted, within the meaning of section 1462 of the Civil Code, and runs with the land, and is binding upon one holding in privity of estate with the assignee of the lessor. (Id.)
6. **ASSIGNEE OF LESSEE—PRIVITY OF ESTATE.**—An assignee of the interest of a lessee, by accepting rent from the claimants under a sublease, becomes in privity of estate with them. (Id.)
7. **ACQUISITION OF ESTATE OF LESSEE AND LESSOR AFTER SUBLETTING—MERGER.**—Where a lessee, after subletting, assigns to a grantee of the lessor, who collects from the sublessee the rent reserved in the sublease, such grantee comes in as an assignee of the reversion and not as the owner of the fee, there being no merger of the term of the original lessee in the estate of his lessor. (Id.)
8. **FAILURE TO DEMAND RENEWAL OF LEASE AFTER LESSOR OBTAINED ESTATE OF LESSEE.**—Where a lessee, having a right to a renewal of his lease upon making a demand therefor, executes a sublease, the terms of which did not require the sublessee to make such demand, and afterward assigns the lease to a grantee of the lessor, the sublessee does not forfeit his right to a renewal by a failure of the assignee of the lessee to demand a renewal from itself as owner of the fee. (Id.)
9. **LEASE OF MINING GROUND BY CORPORATION—NONRATIFICATION BY STOCKHOLDERS—REPEAL OF STATUTE REQUIRING RATIFICATION—SUBSEQUENT ACTS VALIDATING LEASE—ESTOPPEL.**—A mining corporation, which executed a lease of a part of its mining ground at a time when the statute (Stats. 1897, p. 96), was in force requiring such a lease to be ratified by its stockholders, and which, after the repeal of such statute in 1905 (Stats. 1905, p. 74), treated the lease as valid and collected the rent reserved thereby for a period of years, is estopped to assert the invalidity of the lease due to its nonratification by the stockholders. (Id.)

See Corporations, 6; Landlord and Tenant.

LEGISLATURE. See Election, 1, 2.

LICENSE. See Corporations, 1-5.

LIENS. See Mechanics' Liens; Mortgage.

LIFE INSURANCE. See Insurance.

LIMITATIONS OF ACTIONS. See Statute of Limitations.

MANDAMUS.

1. **OPERATION OF PERSONAL WRITS—TERRITORIAL LIMITATION.**—Personal writs cannot run to persons who are not present in the state, and they cannot be enforced upon real property beyond its limits. The writ of mandate cannot be invoked to compel performance of an act which cannot be performed within this state but must be done, if at all, at some place in another state. (*Hobbs v. Tom Reed Gold Mining Co.*, 497.)
2. **VOID ACT NOT COMPELLED BY MANDATE.**—A writ of mandate will not issue to compel the performance of an act that will be wholly void, and of no possible benefit to the petitioner. (*San Diego & Arizona R. Co. v. Board of Equalization*, 41.)
See Corporations, 18-21; Election, 2; Office and Officers, 1, 2; Taxation, 10, 12.

MARRIAGE. See Divorce.

MARRIED WOMEN. See Husband and Wife; Parties.

MASTER AND SERVANT. See Employer and Employee.

MEASURE OF DAMAGES. See Damages.

MECHANICS' LIENS.

1. **LIEN FOR STREET IMPROVEMENT.**—Section 1191 of the Code of Civil Procedure gives a lien to any person who, at the request of the owner of a lot in any incorporated city or town, "grades, fills in, or otherwise improves the same," or the street or sidewalk in front of such lot, or who "makes any improvements in connection therewith." (*Meyer v. City Street Improvement Company*, 645.)
2. **NOTICE OF COMPLETION OF WORK NOT REQUIRED.**—Section 1187 of the Code of Civil Procedure, as it existed prior to the revision of the Mechanics' Lien Law in 1911 (Stats. 1911, p. 1313), requires a notice of completion of work to be filed by the owner in every case in which a lien may be filed under section 1183, but is silent as to liens under section 1191; therefore in case of improvements under the latter section a notice of completion is not required. (*Id.*)
3. **TIME FOR FILING LIEN FOR STREET IMPROVEMENT—STATEMENT OF LIEN.**—The proviso of section 1187 of that code, as then existing, "that in any event all claims of lien must be filed within ninety days after the completion of said . . . improvement," is applicable to any and every improvement for which a lien is given, including those under section 1191 as well as those under section 1183, and the provisions of that section prescribing the form of the statement of liens and requiring that such statement be filed, apply to all such liens. (*Id.*)

MECHANICS' LIENS (Continued).

4. **TIME FOR COMMENCEMENT OF ACTION TO ENFORCE LIEN.**—Section 1190 of that code, as then existing, providing that “no lien provided for in this chapter binds any . . . improvement . . . for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same,” applies to actions for the enforcement of liens for work done under section 1191. (Id.)
5. **MORTGAGE EXECUTED AFTER COMPLETION OF BUILDING—PRIORITY OF LIENS.**—Except as given priority by the provisions of section 1188 of the Code of Civil Procedure, a mortgage of land upon which buildings had been erected, made after the completion of the buildings, and, therefore, after the work was done and materials commenced to be furnished, is subordinated, by section 1186 of that code, to the liens of mechanics and materialmen. (Pugh v. Moxley, 374.)
6. **LIEN AGAINST TWO BUILDINGS—STATEMENT OF SPECIFIC AMOUNTS CLAIMED—BUILDINGS ERECTED UNDER SINGLE CONTRACT.**—Section 1188 of the Code of Civil Procedure, requiring the claimant who files a lien against two or more buildings, or other improvements, to designate the specific amount for which he claims a lien upon each of such improvements, does not require him to make such designation unless there is in fact a specific amount due to him on each of such improvements. The section does not require separate statements of the amount due on each building or improvement, where two or more buildings or improvements are constructed under a single contract for a single consideration. (Id.)
7. **FURNISHER OF MATERIALS WHEN CONTRACTOR OR MATERIALMAN—RELATIVE VALUE OF MATERIALS AND LABOR.**—In determining whether a lien claimant is a “contractor” or a “materialman” within the purview of the Mechanics’ Lien Law, the test of the character of the contract is the relative value of the material and the labor supplied. If the value of the labor is small in comparison with that of the material, the claimant is a materialman. (Id.)
8. **COST OF LABOR SMALL IN COMPARISON WITH VALUE OF MATERIALS.**—One furnishing and installing fixtures and other materials for a building is to be deemed a materialman when the value of the goods supplied was nine hundred and fifty dollars, while the labor cost was only \$128. The same is true of one furnishing lumber, in connection with which the only element of labor cost was a comparatively trifling amount for cartage. (Id.)
9. **REASONS OF DECISION—DICTUM.**—Where a decision is based upon two independent lines of reasoning, neither one can be said to be *dictum*. One is as necessary to the decision as the other. (Id.)
10. **MINER’S LIEN—WORK ON MINING CLAIM—CLAIM OF LIEN—NATURE OF WORK.**—Under section 1187 of the Code of Civil Procedure, a

MECHANICS' LIENS (Continued).

claim of lien for labor performed on mining property need not state the particular character of the labor done, although in an action to enforce the lien, the claimant must show by his proof that his labor was of such kind as is made lienable by section 1183 of that code, that is, that it was development work or mining by the subtractive process. (*McClung v. Paradise Gold Mining Company*, 517.)

11. **CONTRACT AUTHORIZING WORKING OF MINE—ACCOUNTING OF PROFITS—NOTICE OF INTENTION TO DO WORK.**—A contract by a hydraulic mining corporation, whereby it gave a third person an option to purchase a block of its shares, and authorized him to enter upon its mining property and repair the company's flume, and to prospect and examine its mines, accounting to the company for a portion of the gold extracted, is sufficient to put the officers of the corporation on notice that he intended to go to the mine to carry out its objects. (*Id.*)
12. **AGENT OF CORPORATION—DEVELOPMENT WORK ON MINE—WORK BY SUBTRACTIVE PROCESS.**—The holder of such option, in performing the work contemplated by the contract on such mining property, was the agent of the owner, within the meaning of the Mechanics' Lien Law, (Code Civ. Proc., sec. 1183), and the work done by him in repairing such flume and in extracting minerals, was "development work," and work by the "subtractive process." (*Id.*)
13. **CONSTRUCTION OF FLUME FOR HYDRAULIC MINE.**—The construction of a flume and the bringing of water to a hydraulic mine, for the sole purpose of working it by the only way that it could be worked, is development work. (*Id.*)
14. **ASSIGNMENT OF CLAIMS OF LIEN—ASSIGNMENT PRIOR TO RECORDATION.**—Where the claims of liens of persons doing work on such mining property were executed in the individual names of the claimants, and were so recorded, an assignment thereof, although it was executed prior to the recordation of the claims, authorizes the assignee to maintain an action in his own name to foreclose the liens, if by its terms it was not to take effect until after the recordation of the claims. (*Id.*)
15. **ASSIGNEE AGENT OF CLAIMANTS TO RECORD CLAIMS.**—Such claimants, after the execution of the assignment, could delegate to the assignee, as their agent, the power to file the claims in their behalf with the county recorder. (*Id.*)

MESNE PROFITS. See Ejectment.

MINES AND MINING.

1. **MINERAL LOCATION—PLACER CLAIM—LOCATION PERFECTED BY DISCOVERY—ASSESSMENT WORK—ACTUAL POSSESSION.**—An actual discovery of minerals in paying quantities on a placer mining loca-

MINES AND MINING (Continued).

tion on the public domain of the United States subject to mineral location, perfects the location, obviates the necessity of any further work thereon except the assessment work required annually on a claim after discovery and before patent, and dispenses with the necessity of further actual possession. (*Borgwardt v. McKittrick Oil Company*, 650.)

2. **DEVELOPMENT OF SEVERAL LOCATIONS THROUGH AGENCY OF CORPORATION.**—No statute, rule, or policy relating to the disposition of mineral lands, and limiting the quantity of placer mineral land which may be located by one person, forbids a number of persons, who had made *bona fide* locations of placer mining claims in their individual names, the aggregate area of which was within the limit of the amount allowed them by law, from conveying their respective claims to a corporation, organized by them as an agency by means of which their joint interests might be regulated and handled, and in which they became stockholders in equal shares. (*Id.*)
3. **ACTUAL DISCOVERY—ASSESSMENT WORK—FORFEITURE.**—Until a sufficient actual discovery of mineral is made on a placer mining claim, a location is not perfected, and no question of the doing of annual assessment work is involved. It is only after such discovery, when actual possession is no longer necessary to protect the location against subsequent locators, that annual assessment work is essential to prevent a forfeiture. (*Id.*)
4. **RIGHTS OF LOCATOR PRIOR TO DISCOVERY—OIL CLAIM—POSSESSION—PROSECUTION OF DISCOVERY WORK.**—The locator of an oil claim, after the posting of notice of location, etc., acquires no vested right which Congress is obliged to recognize, until the inchoate location is perfected by discovery. But where his location is made in good faith, he has the right, as against third persons, which is transferable, to be protected against all forms of forceable, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession, so long as he remains in possession and with due diligence prosecutes his work toward a discovery. While such a condition continues, no one without his consent can make the actual entry of the land essential to legally initiate a new location. (*Id.*)
5. **NECESSITY OF ACTUAL POSSESSION—DILIGENT PROSECUTION OF DISCOVERY WORK.**—Actual possession of the land by such locator, coupled with continued diligent prosecution of discovery work, with the expenditure of whatever money may be necessary to the end in view, are essential to his protection, and it is only one so actually possessed and so engaged in the diligent prosecution of the work of discovery, who is protected, by reason of his attempted location, against an entry by another. (*Id.*)
6. **INSUFFICIENT EVIDENCE OF DISCOVERY WORK—PLACING MEN IN CHARGE OF CLAIM—EFFORTS TO HIRE PERSONS TO DO WORK.**—In an

MINES AND MINING (Continued).

action to quiet title to oil lands claimed by the respective parties under different locations, a finding that the plaintiffs were engaged in the prosecution of discovery work at a time when the defendant entered the land and commenced its own discovery work, is not sustained by evidence merely to the effect that the plaintiffs had placed men in a cabin on an adjoining tract of land, with directions simply to watch their location and walk over it once or twice a day, and the mere fact that the plaintiffs, during the interval between their location and the entry of the defendant, were engaged in negotiations with other persons as to what they would charge for doing the work of discovery, or were making an effort to find someone who would do such work at a satisfactory price, is insufficient to constitute a diligent prosecution of the work of discovery. (Id.)

7. REASONABLE TIME TO COMMENCE DISCOVERY WORK NOT ALLOWED.—

The attempting locator is protected in his possession only while he may fairly be held to be actually engaged in such work as may reasonably be held to be discovery work. He is not protected in his possession without commencing such work for a reasonable time after making his location. (Id.)

8. LOCATOR PRIOR TO DISCOVERY MAY COMMENCE WORK AT ANY TIME BEFORE RIGHTS OF OTHERS HAVE ATTACHED.—A prior locator of a placer mining claim, the location of which had never been perfected by discovery, and which he had not voluntarily abandoned, did not forfeit his location by the mere failure to prosecute development work, and had the right to subsequently enter into possession of the land and do discovery work thereon at any time he could do so without transgressing any right obtained by another. (Id.)

9. SUBSEQUENT LOCATION—DISCOVERY WORK FIRST INITIATED BY PRIOR LOCATOR.—Such a prior locator, by again going into possession and commencing discovery work, did not violate any right of a subsequent locator, who was not at the time in the actual possession of the land, engaged in the diligent prosecution of discovery work thereon. (Id.)

10. EVIDENCE OF DISCOVERY OF OIL—PASSING THROUGH OIL SANDS TO REACH LOWER DEPTHS—WELL RENDERED USELESS BY FLOW OF WATER.—The locator of an oil claim, immediately following his location, proceeded with the work of development, with the result that a well was drilled to the depth of about one thousand one hundred feet. At a depth of some seven hundred and seventy-five feet, twenty-five feet of rich oil sands were discovered, capable of producing forty barrels of oil per day. No oil was in fact produced, the locator endeavoring to pass through and reach a greater production at a lower depth. Finally an immense flow of artesian water was struck, which prevented further operations in that well.

MINES AND MINING (Continued).

Held, that a sufficient discovery of oil was made to perfect the location. (Id.)

11. **QUARTZ LOCATION OVERLAPPING PRIOR VALID PLACER CLAIM—FINDINGS—EVIDENCE—WANT OF DISCOVERY—FAILURE TO DO ASSESSMENT WORK.**—In an action to recover the possession of land included within a quartz mining location, the evidence is held sufficient to support the findings that the plaintiff's quartz location overlapped a portion of a certain placer mine which, for upward of ten years, had been owned and continuously worked by one of the defendants and his predecessors in interest; that at the time said quartz claim was located by the plaintiff, there was no discovery made by plaintiff of gold-bearing rock or mineral in place, and that the plaintiff had failed to do the annual assessment-work on his claim. (*Olaine v. McGraw*, 424.)
12. **PLEADING—ANSWER DENYING PLAINTIFF'S OWNERSHIP—EVIDENCE OF PRIOR PLACER CLAIM.**—In such action, the defendants, under an answer denying the plaintiff's ownership as well as all the other allegations of the complaint, may offer evidence of their ownership and occupancy under the prior placer location, without specifically pleading such defense. (Id.)
13. **ESTABLISHMENT OF HIGHWAY OVER PLACER CLAIM.**—The action of the board of supervisors in declaring a portion of such placer mining claim to be a public highway could not affect the claim further than to establish an easement over it to the extent stated, for public use as a highway. In such action, evidence of the establishment of the highway is immaterial. (Id.)

See Corporations, 18-21; Lease, 9; Mechanics' Liens, 10-15.

MISTAKE.

1. **SALE—REFORMATION—GUARANTY AGAINST PRINTED SELLING PRICES OF ANOTHER MANUFACTURER—ABSENCE OF MISTAKE IN WORDING OF CONTRACT.**—A provision in a written contract for the sale and delivery of certain canned goods to be thereafter packed by the seller, guaranteeing the prices therein fixed against the "opening printed prices" for the season of a specified packing company whose selling prices fixed and controlled the market prices of such goods, and whose previous custom had been to announce its opening selling prices by a printed circular issued to the trade but who omitted to do so for the season in question, may be reformed so as to express the mutual intention of the parties that the guaranty should protect the purchaser against any prices which might be made on such goods by such packing company, whether the prices so fixed by it were printed or announced by other methods. This is so, although there was no mistake between the parties with respect to the words

MISTAKE (Continued).

which were inserted in the guaranty provision. (Cutting Company v. Peterson, 44.)

2. MUTUAL MISTAKE RENDERING WORDS USED INAPPLICABLE TO EXPRESS INTENT.—The fact that the parties to a contract used the very words which they intended to use is not always sufficient cause for refusing the relief of reformation. There may be no mistake as to the words used or to be used, and at the same time there may have been a mutual mistake as to some other matter of fact, affecting the meaning or application of the words and by reason thereof the contract may not truly express the real intention of both parties, and in that event it may be revised and reformed at the instance of the aggrieved party and enforced accordingly, although the words were carefully chosen. (Id.)

3. MISTAKE IN EXPECTING CERTAIN THING TO HAPPEN IN FUTURE.—The mutual mistake of the parties to such contract consisted in expecting a thing to happen in the future which did not occur, that is, that the packing company referred to would issue its customary printed price list. That led to the insertion of the word "printed" in the guaranty. (Id.)

4. MISTAKE AS TO FUTURE EVENT—DOCTRINE OF REFORMATION APPLICABLE TO.—Relief from the consequences of a mutual mistake is not confined to cases where the mistake was with reference to a past event, or to the present existence of some fact or thing. The doctrine is applicable where both parties by mistake expect a future event to occur and describe the subject matter by words which make the intent clear if the event does happen as expected, but which defeat the real intent if the event does not so happen. (Id.)

See Deed, 13.

MORTGAGE.

1. DEED ABSOLUTE IN FORM—PAROL EVIDENCE—SECURITY FOR DEBT.—

A deed absolute in form may be shown by parol evidence to have been intended to be a mortgage, and if it was intended merely as security for the payment of a debt, it is a mortgage, no matter how strong the language of the deed or any instrument accompanying it may be. (Todd v. Todd, 255.)

2. EFFECT OF EVIDENCE—QUESTION FOR TRIAL COURT.—Where there is a substantial conflict in the evidence as to the character of the instrument, it is primarily for the trial court to determine whether the evidence in favor of the claim of mortgage is clear and convincing. (Id.)

3. FINDING—EVIDENCE.—The finding that the deed in question was intended as a mortgage, is held to be sustained by the evidence, without substantial contradiction. (Id.)

MORTGAGE (Continued).

4. **OBLIGATION ESSENTIAL TO MORTGAGE—NEED NOT BE EVIDENCED BY WRITING.**—The existence of an obligation to be secured is essential to the mortgage, but it is not necessary that the obligation be evidenced in writing, if in fact there was a debt. (Id.)
5. **ACTION FOR REDEMPTION FROM MORTGAGE — PLEADING — MATURITY OF DEBT.**—In an action to have a deed declared a mortgage and for its satisfaction upon payment of the loan to secure which it was given, the fact that such loan was due and payable is sufficiently shown by an allegation of the complaint to the effect that the date on which the plaintiff had agreed to pay the loan had passed, and that no part thereof, except a specified amount, had been paid. (Id.)
6. **EXCUSE OF LACHES—CONSENT OF MORTGAGEE TO DELAY.**—The laches of the plaintiff in delaying the commencement of such action for over thirteen years after the maturity of the loan, is excused, if the defendant, during that period, repeatedly excused and exonerated the plaintiff from the obligation to make further payments on the indebtedness and requested him not to make further payments. (Id.)
7. **SALE OF PART OF MORTGAGED PREMISES—CONSENT OF MORTGAGOR —ESTOPPEL.**—The grantor under such deed is not estopped to claim it was intended as a mortgage merely because he consented to a sale by the grantee of a part of the premises conveyed, and claimed a credit of the purchase price on the indebtedness secured by the deed. (Id.)

See Building and Loan Association; Deed of Trust; Mechanics' Liens, 5; Receiver; Statute of Limitations, 1-6.

MUNICIPAL CORPORATIONS. See Office and Officers, 1-10; Street Assessment, 6-11; Taxation, 5-9.

MURDER AND MANSLAUGHTER. See Criminal Law, 8-24.

NAVIGABLE WATERS. See Tide Lands.

NEGLIGENCE.

1. **PERSONAL INJURIES — EVIDENCE — WEALTH OF DEFENDANT.**— In an action to recover the actual damages occasioned the plaintiff for personal injuries received by him from a collision with an automobile negligently driven by the defendant, in which there was neither averment nor testimony tending to establish fraud, oppression, or malice, the plaintiff cannot introduce evidence as to the defendant's wealth. The introduction of evidence upon that subject could only have the effect of prejudicing the rights of the defendant. (Story v. Green, 768.)

NEGLIGENCE (Continued).

2. **MEASURE OF DAMAGES — ERRONEOUS INSTRUCTION.**—The error in admitting such evidence was not cured by a general instruction to the jury in which the proper elements of damage in such a case were enumerated, if the court further specifically instructed them, in the event they found for the plaintiff, that they might in determining the amount of their award, take into consideration the pecuniary condition of the defendant as disclosed by the evidence. (Id.)
3. **TESTIMONY BY DEFENDANT RESPECTING HIS PROPERTY—ERROR NOT CURED.**—The error in permitting the plaintiff, as part of his case, to question the defendant on the subject of his wealth, was not cured by the fact that the defendant, in opening his own case, took the stand and gave testimony in his own behalf regarding his property, if such testimony amounted to nothing more than additional cross-examination for the purpose of explaining some of the matters brought out in his examination in chief while he was testifying as plaintiff's witness. (Id.)
4. **ERRORS NOT WAIVED BY ABANDONMENT OF APPEAL FROM ORDER REFUSING NEW TRIAL.**—Such errors were not waived by the failure of the defendant to perfect his appeal from an order denying his motion for a new trial. They are properly reviewable on an appeal from the judgment. (Id.)
5. **REMARKS OF COUNSEL DURING TRIAL—PREJUDICE TO DEFENDANT.**—Where one of the counts of the complaint in such action charged that at the time of the accident the defendant was violating a municipal ordinance applicable to the driving of automobiles, and during the trial it appeared that the defendant was a practicing attorney at law, it was improper, and possibly prejudicial, for counsel for the plaintiff to make a remark to the effect that because the defendant was a lawyer, and presumed to know the law, he should be held to a stricter accountability than a layman. The injurious effect of such remark was cured by a statement of the court to the effect that the occupation of the defendant was not a material subject of inquiry. (Id.)
6. **EMPLOYER AND EMPLOYEE—FURNISHING SAFE APPLIANCES.**—While a master is not obliged to furnish his employee with the latest improvements in machinery, tools, or appliances, he is always under the duty in the use of proper care, to furnish him with suitable machinery, tools, and appliances. (*Lonnergan v. Stansbury*, 488.)
7. **WAGON WITHOUT BRAKE AND WITH INSECURE SEAT—QUESTION FOR JURY.**—Whether a wagon, furnished by an employer to his teamster for the purpose of hauling brick over a hilly road, was an unfit instrumentality by reason of its having no brake and an insecure seat, is a question for the jury, in an action by the employee to recover damages for personal injuries occasioned by the running away of the team attached to the wagon, while going down a grade. (Id.)

NEGLIGENCE (Continued).

8. **ASSUMPTION OF RISK BY TEAMSTER—USE OF UNSAFE WAGON FOR ONE DAY.**—It cannot be said, as matter of law, that the teamster assumed the risk of the defective condition of such wagon, where, after protesting concerning the absence of a brake and receiving the assurance of the foreman that he would not need one, he undertook the work with it, and was injured on the first day while so employed. (Id.)
9. **INSTRUCTIONS—DUTY TO FURNISH SUITABLE APPLIANCES—FAILURE TO EXERCISE REASONABLE CARE.**—In an action to recover for such injuries, a preliminary instruction declaring it to be a part of the duty of the employer "to furnish suitable appliances by which the service is to be performed and to keep them in repair and order and to make such provisions for the safety of the employees as will reasonably protect them from the dangers incident to their employment," will not be deemed erroneous for its failure to announce that the employer is liable only if he has failed to exercise reasonable care and diligence in the selection and furnishing of such appliances, if such qualification of his liability is repeatedly stated in subsequent instructions. (Id.)
10. **MEASURE OF DAMAGES—DAMAGES REASONABLY PROBABLE TO RESULT IN FUTURE.**—An instruction in such action, that if the jury found for the plaintiff, he was entitled to recover for all damages proximately resulting from the injury which he has suffered up to the time of the trial, and for all such damages that it is "reasonably probable" that he will sustain in the future, is not rendered erroneous by the use of the phrase "reasonably probable," if it sums up its declaration of the law with the pronouncement of the correct rule embodied in section 3283 of the Civil Code, that he is entitled to recover for all damages "certain to result in the future." (Id.)
11. **RAILROAD—CONTRIBUTORY NEGLIGENCE—VOLUNTARILY TAKING POSITION OF DANGER ON STEP OF PLATFORM.**—An experienced locomotive fireman, traveling to the particular place of his employment on a regular passenger train of the railroad that employed him, is guilty of contributory negligence, if, in anticipation of jumping from the train at a roundhouse a considerable distance from its regular stopping place, he voluntarily placed himself on the lower steps of the platform of the car, holding on by the hand rails, at a time when he knew the train was rounding a double curve, and approaching a switch and going at a speed of thirty miles an hour, and while in such position was thrown to the ground as the result of the swaying of the car. (Clark v. Atchison, Topeka and Santa Fe Railway Company, 363.)
12. **PROMISE OF ENGINEER TO SLOW UP PASSENGER TRAIN—EVIDENCE—WANT OF AUTHORITY IN ENGINEER.**—In an action against the railroad to recover for the personal injuries so occasioned, it was error to

NEGLIGENCE (Continued).

allow the plaintiff to testify that the engineer of the train promised that he would slow up opposite the roundhouse to allow plaintiff to jump off, provided the train was on time, without first requiring proof that the engineer was authorized by the railroad to slow up trains for that purpose. (Id.)

13. **NEGLIGENCE OF ENGINEER IN MAKING OR FAILURE TO KEEP PROMISE.**—The unauthorized promise of the engineer to slow up, not having been within his actual or ostensible authority, nor within the apparent scope of his duty, and his lack of authority having been known to the plaintiff, was inadmissible in such action as evidence of want of care by the engineer either in making the promise or in failing to keep it. (Id.)
14. **REBUTTAL OF CONTRIBUTORY NEGLIGENCE.**—Evidence of such promise was not material in rebuttal of the plaintiff's contributory negligence in putting himself in such position at a time when he knew that the train was going thirty miles an hour and that it could not be slowed up enough to allow him to jump off. (Id.)
15. **PLEADING—FAILURE OF PROOF—VARIANCE.**—Where the complaint alleged that the defendant negligently ran its trains around the curve at a high speed, causing it to violently sway so as to break plaintiff's hold on the rods, whereby he was thrown from the car to the ground, the fact that the plaintiff failed to prove that the engineer has authority to slow up the train, made simply a failure of proof and not a variance. (Id.)
16. **ACTION BY ADMINISTRATOR TO RECOVER FOR DEATH—PLEADING—ALLEGATION SHOWING HEIRS OF DECEASED ESSENTIAL.**—The complaint in an action brought, under section 377 of the Code of Civil Procedure, by the administrator of the estate of a deceased person who was not a minor, to recover damages for his negligent death, fails to state a cause of action unless it be alleged that the deceased left heirs. A mere allegation that by reason of the death, "his heirs and personal representatives have suffered damages" in a specified sum is insufficient. (Ruiz v. Santa Barbara Gas and Electric Company, 188.)
17. **ACTION BY SPECIAL ADMINISTRATOR—SUBSTITUTION OF GENERAL ADMINISTRATOR.**—Under section 1416 of the Code of Civil Procedure, the general administrator of the estate of a deceased person is entitled to be substituted as plaintiff in, and to prosecute to final judgment, any action instituted by a special administrator of the estate which he was authorized to commence. (Id.)
18. **ACTION BY PERSONAL REPRESENTATIVE OF DECEASED—RECOVERY FOR BENEFIT OF HEIRS OR RELATIVES—NEGLIGENT DEATH OF EMPLOYEE.**—The action authorized by section 377 of the Code of Civil Procedure to recover damages for the negligent death of a

NEGLIGENCE (Continued).

person not a minor, is solely for the benefit of the heirs of the deceased. The money recovered in such action does not belong to the estate but to the heirs only, and the administrator has the right to bring the action only because the statute authorizes him to do so, but he is simply made a statutory trustee to recover damages for the benefit of the heirs. The same is true of the action authorized by section 1970 of the Civil Code, as amended in 1907, purporting to give a right of action, for and on behalf of "the widow, children, dependent parents, and dependent brothers and sisters," against an employer for damages resulting from the death of an employee in certain cases, to "the personal representatives of such employee." (Id.)

19. **SPECIAL ADMINISTRATOR MAY SUE FOR NEGLIGENT DEATH—ORDER OF APPOINTMENT AUTHORIZING SUIT.**—Section 1415 of the Code of Civil Procedure authorizes the commencement and maintenance by a special administrator, when authorized by the order of court appointing him, of any suit or legal proceeding that might be commenced or maintained by the general administrator or executor; and, as the right to maintain an action to recover for a negligent death under either section 377 of the Code of Civil Procedure or section 1970 of the Civil Code is expressly conferred upon such general personal representatives, the special administrator has the same right, when authorized by the order of court appointing him. (Id.)
20. **AMENDED COMPLAINT—NEW CAUSE OF ACTION NOT STATED—STATUTE OF LIMITATIONS.**—Where there is no attempt to state a new cause of action in an amended complaint, but merely the addition of matters essential to make the original cause of action complete, the amendment, though made after the expiration of the period of limitation for the action, relates back to the time of its commencement. (Id.)
21. **FAILURE TO ALLEGE HEIRSHIP OR RELATIONSHIP TO DECEASED—AMENDED COMPLAINT CURING DEFECT—ERROR IN REFUSING LEAVE TO FILE.**—Where the original complaint in an action instituted by a special administrator to recover for the alleged negligent death of an employee of the defendant, was filed in time but was defective in failing to show that the deceased left any heirs, as required by section 377 of the Code of Civil Procedure, or any relatives for whose benefit such action is authorized by section 1970 of the Civil Code, an amended complaint curing the defect does not state a new or different cause of action, and it was error for the trial court to refuse to permit it to be filed on the ground that a new cause of action was stated therein, which was then barred by the statute of limitations. (Id.)

NEGLIGENCE (Continued).

22. APPLICATION FOR LEAVE TO FILE AMENDED PLEADING—PROPER PRACTICE—SUFFICIENCY SHOULD BE TESTED BY DEMURRER.—On an application to the trial court for leave to file such an amended complaint, the court should not consider any objection based upon the sufficiency of its allegations as a matter of pleading, or any objection based upon the statute of limitations. The proper practice is to permit the amendment to be filed and to determine its sufficiency on demurrer, when leave might be given to the pleader to amend if the pleading be held insufficient and the court deem it proper to grant such leave. (Id.)

See Employer and Employee.

NEGOTIABLE INSTRUMENTS. See Promissory Notes.

NEW TRIAL.

- 1. NEWLY DISCOVERED EVIDENCE—NECESSARY SHOWING.**—A new trial cannot be granted on the ground of newly discovered evidence, in the absence of a showing that the proposed evidence was not known to the moving party at the time of the trial, or, if not then known, could not with reasonable diligence have been discovered and produced at the trial. (Olaine v. McGraw, 424.)
- 2. WRITTEN OPINION OF TRIAL JUDGE—RECORD ON APPEAL.**—A written opinion of the trial judge filed in determining a motion for a new trial constitutes no part of the record on appeal and cannot operate to limit the effect of the order as actually made. (Classen v. Thomas, 196.)
- 3. LIMITATION OF GROUNDS OF ORDER MUST APPEAR THEREIN.**—Any limitation of the grounds upon which such order is made must, to be effectual, be specified in the order itself. (Id.)
- 4. ORDER ENTERED IN MINUTES GRANTING NEW TRIAL—WRITTEN OPINION SIGNED AND FILED BY JUDGE.**—Where there is an order granting a new trial entered upon the minutes of the court, and also a paper signed and filed by the judge stating his reasons for his conclusion that a new trial should be granted, and ending with the words "The motion for a new trial will be granted," the latter paper is simply the written opinion of the judge, and in no sense an order granting a new trial. The order entered in the minutes is the only record of the court's action, and is to be measured by its terms. (Id.)

See Deed of Trust, 2.

NONSUIT. See Appeal, 2, 3.

NOTICE. See Judicial Notice; Lease, 3; Pledge, 3, 4.

OFFICE AND OFFICERS.

1. **PUBLIC OFFICERS—FIXED COMPENSATION—MANDAMUS TO COMPEL ISSUANCE OF WARRANT FOR SALARY.**—*Mandamus* is an appropriate remedy to compel an auditing officer to issue a warrant for the compensation of the employees or officers of a city, county, or state, where the amount thereof is so fixed by law, ordinance, or otherwise that the act of auditing the same and drawing a warrant accordingly is merely ministerial in character. (Scott v. Boyle, 321.)
2. **SUPREME COURT—ORIGINAL JURISDICTION IN MANDAMUS—APPEAL INVOLVING SAME QUESTIONS.**—The supreme court has original jurisdiction of such cases, and the fact that the same questions are involved in an appeal which has been taken thereto has no bearing upon the question of jurisdiction. (Id.)
3. **SEALERS OF WEIGHTS AND MEASURES—CONSTITUTIONALITY OF ACT OF MARCH 18, 1911—APPOINTMENT BY CITIES AND COUNTIES.**—Prior to its amendment on October 10, 1911, section 14 of article XI of the constitution, providing that “no state office shall be continued or created in any county, city, town, or other municipality, for the inspection, measurement, or graduation of any merchandise, manufacture, or commodity; but such county, city, town, or municipality may, when authorized by general law, appoint such officers,” empowered the legislature to enact the statute of March 18, 1911 (Stats. 1911, p. 384), authorizing the respective counties and municipalities of the state to appoint sealers of weights and measures, having the duties provided by that act. (Id.)
4. **RIGHT OF MUNICIPALITY TO MAKE APPOINTMENT UNDER POLICE POWER.**—If such statute were unauthorized by that provision of the constitution, still an ordinance of a municipality authorizing the appointment of a sealer of weights and measures, and his deputies, and fixing their compensation, would be valid as an exercise of the police power conferred on municipalities and counties by section 11 of article XI of the constitution. (Id.)
5. **AMENDMENT OF SECTION 14 OF ARTICLE XI OF CONSTITUTION—STATUTE NOT REPEALED.**—Such statute is not inconsistent with, and was not repealed or rendered inoperative by, the amendment of October 10, 1911, of section 14 of article XI of the constitution, providing that the legislature may by general and uniform laws provide for the inspection, measurement, and graduation of merchandise and manufactured articles and commodities, and may provide for the appointment of such officers as may be necessary for such inspection, measurement, and graduation. (Id.)
6. **MUNICIPALITIES STILL HAVE RIGHT TO APPOINT UNDER POLICE POWER.**—The amendment of section 14 of article XI of the constitution does not purport to repeal section 11 of the same article, and is not inconsistent therewith, and counties and municipalities

OFFICE AND OFFICERS (Continued).

would have and still have the power to enact such an ordinance, under said section 11, in the absence of a general law inconsistent with its exercise by them. (Id.)

7. **ABSENCE OF STATE SYSTEM REGULATING SEALERS OF WEIGHTS AND MEASURES.**—That amendment does not prescribe any special method for the exercise by the legislature of the power expressly mentioned, and it may now, under the general power granted by section 1 of article IV of the constitution, and also under the power specially described in the amended section, provide either a state system for such purpose, administered by state officers, or a local system administered by the respective counties, cities, or cities and counties, through officers which they may appoint under the authority of the general statute. There being no statute providing such state system, the act of March 18, 1911, remains in force as fully as if the amendment had not been made, and until the repeal of such act, or the establishment of a state system, the provisions of the act prevail and the officers appointed under it are *de jure* officers. (Id.)
8. **MUNICIPALITY MAY FIX COMPENSATION OF SEALER.**—The provision of section 5 of article XI of the constitution, requiring the legislature to regulate and fix the compensation of county officers in proportion to duties, does not apply to officers created by the legislature, under said section 14, to exercise a part of the police powers of the state, which the provisions of that latter section, both in its original form and as amended, recognize as something distinct from the general political functions of counties and cities, and the general scheme of county or municipal government. (Id.)
9. **ACT IS UNIFORM IN OPERATION AND NOT SPECIAL LAW.**—The act of March 18, 1911, applies throughout the state to all the counties, cities and municipalities thereof, and is therefore uniform in its operation. The fact that it is not made compulsory upon the respective counties and municipalities to appoint such sealers does not render it lacking in the uniformity necessary to a compliance with section 11 of article I of the constitution, nor make it a special law within the meaning of subdivisions 9, 28, and 29 of section 25 of article IV. (Id.)
10. **ORDINANCE MAY AUTHORIZE MAYOR TO APPOINT SEALER.**—An ordinance of a municipality authorizing the mayor, as the executive officer of the city, to appoint the sealer, is an appropriate method of carrying into effect the provision of the statute that the sealer may be appointed by the municipality. (Id.)
11. **PUBLIC OFFICER—SURETY ON OFFICIAL BOND—OFFICER SUCCESSOR TO HIMSELF—LIABILITY FOR PRIOR DEFAULTS.**—The surety upon the official bond of a public officer cannot, in the absence of express stipulation to that effect, be held liable for defaults or delinquencies

OFFICE AND OFFICERS (Continued).

of the principal occurring before the execution of the bond. This rule is not altered by the fact that the principal has been the incumbent of the office for a preceding term. (*People v. Metropolitan Surety Co.*, 174.)

12. **PRESUMPTION AS TO TIME OF DEFALCATION.**—In a suit against a surety to recover the amount of a shortage in the accounts of a public officer who has filled several successive terms, the mere fact of a defalcation, without more, creates no presumption as to the time when it occurred. The time of its occurrence is for the jury to determine from all the facts in evidence, and the burden of proof on that issue is on the plaintiff. (*Id.*)

See Election; Taxation, 10-12.

OIL LANDS. See Mines and Mining, 1-10.

PARENT AND CHILD.

1. **DIVORCE—CUSTODY OF CHILD AWARDED TO MOTHER—LETTERS OF GUARDIANSHIP ISSUED TO MOTHER—DUTY OF FATHER TO SUPPORT.** Under section 196 of the Civil Code, a father is under no duty of supporting his minor child, after a decree of divorce had been obtained against him in another state upon substituted service of summons, which decree awarded the custody of the child to the mother, without requiring him to contribute to its support, and after the mother had sought and obtained letters of guardianship of the child in this state. (*Matter of McMullin*, 504.)
2. **FOREIGN DECREE OF DIVORCE—SUBSTITUTED SERVICE—VOID MONEY JUDGMENT FOR ALIMONY.**—A provision in the divorce decree, purporting to direct the husband to pay the sum of one hundred dollars a month to his wife as alimony, is void, for want of jurisdiction of the person of the husband, and cannot be construed as having been intended in part for the support of the child. (*Id.*)

See Adoption.

PARTIES.

DEFECT OF PARTIES — NONJOINDER OF HUSBAND OF MARRIED WOMAN AS PLAINTIFF—WAIVER OF OBJECTION.—The objection that the plaintiff was a married woman, and that her husband should have been joined with her, is in effect a plea of defect of parties plaintiff, which, if not taken by demurrer, where appearing on the face of the complaint, or by answer, is deemed waived. A mere denial in the answer of an allegation in the complaint that the plaintiff is an unmarried woman is insufficient to set up such plea. (*Hayt v. Bentel*, 680.)

See Eminent Domain, 20-23; Fraud, 6; Water and Water-Rights, 13.

PARTITION. See Assignment, 1-8.

PAYMENT. See Assignment, 7; Deed of Trust, 5-7; Taxation, 5, 6; Vendor and Vendee, 1-4, 8, 9, 21-26.

PENALTY.

1. **CONTRACT—PENALTY—CONSTRUCTION.**—In determining whether a provision in a contract is for liquidated damage or for a penalty, the fundamental rule is that the construction of such stipulations depends, in each case, upon the intent of the parties, as evidenced by the entire agreement construed in the light of the circumstances under which it was made. (Nakagawa v. Okamoto, 718.)
2. **PROMISSORY NOTES HELD TO HAVE BEEN INTENDED BY WAY OF PENALTY OR FORFEITURE—PROOF OF ACTUAL DAMAGE ESSENTIAL TO RECOVERY.**—Promissory notes held to have been intended by way of penalty or forfeiture, in view of which, in the absence of proof of actual damage, no recovery can be had on the notes. (Id.)

PHARMACY BOARD. See Poisons.

PLACE OF TRIAL.

1. **CLAIM AND DELIVERY—WAIVER OF RIGHT TO CHANGE.**—Although a defendant has, under section 395 of the Code of Civil Procedure, the absolute right to have an action in claim and delivery of personal property tried in the county where he resided at the time it was brought, still he may waive such right, and he does waive it unless he follows the procedure for asserting it. (Bohn v. Bohn, 532.)
2. **PROCEDURE FOR CHANGE—MOTION AND ORDER FOR CHANGE ESSENTIAL.**—The procedure for the assertion of such right is not regulated solely by section 396 of that code, but by section 397 also, which requires a motion to be made by the defendant for a change of the place of trial to the county of his residence, in addition to the demand and affidavit of merits, as one of the necessary steps in the procedure to obtain the order of transfer. The change can be effected only through such order. (Id.)
3. **NOTICE OF MOTION ESSENTIAL—TIME OF HEARING MOTION MUST BE STATED.**—The motion for an order of transfer must be made upon notice to the plaintiff. Such notice must be in writing and conform to the requirements of section 1010 of the Code of Civil Procedure, and must contain, *inter alia*, a statement of the time when the motion would be made or brought on for a hearing. The absence of such a statement renders the notice fatally defective, and necessitates a denial of the motion. The rule for liberal construction, embodied in section 396 of that code, does not excuse a failure to observe such requirement. (Id.)

PLACE OF TRIAL (Continued).

4. **APPEARANCE IN OPPOSITION TO MOTION—WAIVER OF NOTICE—LIMITED APPEARANCE.**—The appearance of the plaintiff in opposition to the motion for transfer, for the limited purpose of objecting to its consideration upon the ground of the insufficiency of notice, did not constitute a waiver of a proper notice. (Id.)
5. **POSTPONEMENT OF HEARING—GIVING NEW NOTICE—FAILURE OF DEFENDANT TO REQUEST.**—Where the notice of motion for a change of the place of trial is so defective, it would have been proper for the trial court, at the request of the defendant, to defer a determination of the motion to enable the defendant to give a proper notice. In the absence of such a request, a denial of the motion, without giving the defendant an opportunity to give a proper notice, cannot be objected to by the defendant on an appeal from the order of denial. (Id.)
6. **ORDER REFUSING CHANGE—APPEAL.**—An order denying a motion for a change of the place of trial is itself appealable, and its correctness cannot be reviewed on an appeal from the judgment. (Id.)
7. **RULE OF COURT FIXING REGULAR MOTION DAYS.**—A rule of court establishing regular days for the hearing of motions, cannot be construed to dispense with the notice which the code declares shall be given to authorize the court to hear a motion. (Id.)

PLEADING. See Accounting; Brokers; Creditor's Bill, 6; Ejectment, 3; Eminent Domain, 4-6, 12; Employer and Employee, 20; Estates of Deceased Persons, 11, 12; Fraud, 1; Justice's Court, 3-5; Laches, 1; Mines and Mining, 12; Mortgage, 5; Negligence, 15, 16, 20-22; Parties; Statutes of Limitations, 9; Taxation, 16; Vendor and Vendee, 5, 16, 18, 19, 29.

PLEDGE.

1. **REFUSAL TO RETURN PROPERTY—SINGLE CAUSE OF ACTION—JUDGMENT FOR RETURN—BAR TO SUBSEQUENT ACTION FOR DAMAGES.**—The wrongful refusal of a pledgee to redeliver the pledged property creates but a single cause of action in favor of the pledgor, and a judgment in his favor in an action for the return of such property is a bar to a subsequent action to recover damages for wrongfully withholding its possession, or for the repayment of attorney's fees incurred in the prior action. (Van Horne v. Treadwell, 620.)
2. **DEPRECIATION IN VALUE OF PROPERTY DURING LITIGATION.**—The continued withholding of stocks and bonds after the bringing of action to enforce their delivery, pending the litigation and up to the time of the enforcement of the decree, is not a new wrong redressible by a new action, but is simply a continuation of the orig-

PLEDGE (Continued).

inal wrong for which the only redress given by the law must be had in the original action, and consequently a second action will not lie for the damage due to depreciation in the value of the stocks or bonds occurring between the time of the commencement of the first action and the determination of such action on appeal. (Id.)

3. **PLEDGE OF ACCOMMODATION NOTES—LIMITATION ON LIABILITY OF MAKERS—NOTICE TO BANK AS PLEDGEE—KNOWLEDGE PREVIOUSLY ACQUIRED BY PRESIDENT OF BANK—FORGETFULNESS OF TIME OF PLEDGE.**—A bank which becomes the pledgee of certain accommodation promissory notes that were executed by the makers for the purpose of being used by the payees as collateral security for a particular loan, under a general understanding between the payees and the makers that they should not be used in such a way as to render the makers liable thereon beyond a certain proportion of their amount, is not charged with notice of the purpose for which the notes were to be used, or of the limit of liability thereon, by reason of the knowledge of such facts acquired at the time of the execution of the notes by a person who afterward became the president of the bank, and was such at the time the notes were taken by it as collateral security, unless such knowledge was present in the mind of the president at the time the notes were pledged. (Cooke v. Mesmer, 332.)
4. **NOTICE — KNOWLEDGE ACQUIRED BY AGENT PRIOR TO AGENCY—NOTICE TO PRINCIPAL.**—While the decided weight of authority is in favor of the rule that knowledge possessed by an agent while he occupies that relation and is executing the authority conferred upon him, as to matters within the scope of his authority, is notice to his principal, although such knowledge may have been acquired before the agency was created, it is universally recognized that this rule is subject to the qualification that knowledge acquired by an agent before the commencement of the agency is not notice to the principal unless it is shown or appears that knowledge was present in his mind at the time he acted for the principal. (Id.)

See Building and Loan Associations; Guaranty, 3-8.

POISONS.

1. **PHARMACY AND POISON ACTS IN PARI MATERIA—HARMONIOUS CONSTRUCTION—POWER OF PHARMACY BOARD TO MAKE REGULATIONS.**—The so-called "Pharmacy Act" of 1905 (Stats. 1905, p. 535), as amended in 1909 (Stats. 1909, p. 1013), and the so-called "Poison Act" of 1907 (Stats. 1907, p. 124), as subsequently amended (Stats. 1909, p. 422; 1911, p. 1106), are *in pari materia*, dealing in many particulars with the same subject matter, and are to be construed and harmonized, if possible. So construed, the power is expressly conferred upon the board of pharmacy to promulgate "regulations

POISONS (Continued).

not inconsistent with the laws of this state as may be necessary for the protection of the public" in the sale of poisons. (In re Potter, 735.)

2. **REGULATIONS MUST NOT BE INCONSISTENT WITH LAWS.**—The power of the board in that respect is limited to the adoption of such regulations as are not "inconsistent with the laws of this state." (Id.)
3. **GROCERS AUTHORIZED TO SELL CERTAIN POISONOUS PREPARATIONS IN ORIGINAL PACKAGES—PHARMACY BOARD CANNOT DESTROY RIGHT TO SELL.**—Section 16 of the so-called Pharmacy Act as amended in 1909, expressly authorizes the sale by grocers and dealers generally of certain enumerated articles containing arsenic and other poisons, "when prepared and sold only in original and unbroken packages and labeled with the official poison labels," and the pharmacy board has no power to enact a regulation which would, in effect, deprive grocers of their right to sell any ant poison which might be an arsenical compound, and to limit the right of sale of such poisons to regular licensed pharmacists. (Id.)
4. **DELEGATION BY LEGISLATURE OF POWER TO MAKE REGULATIONS.**—The legislature has power to delegate to proper authority the making of suitable rules and regulations for the conduct and transaction of any branch of the business of the state, and to declare a violation of those rules a penal offense. (Id.)
5. **CONSTITUTIONALITY OF POISON ACT.**—The so-called Poison Act of March 6, 1907, is constitutional. (Id.)
6. **AMENDMENT OF 1911 TO POISON ACT—PHARMACY ACT NOT REPEALED.**—The amendment of 1911 to the Poison Act, by the provision regulating the vending of opium and its derivatives, cocaine, chloral hydrate, and other like drugs and poisons, did not have the effect to re-enact the Poison Act as of the date of the amendment, and thus to repeal by implication the authority in the Pharmacy Act for the sale of certain poisons by grocers. (Id.)

POLICE POWER. See Office and Officers, 4, 6.

POLITICAL PARTIES. See Elections, 3, 4.

POSSESSION. See Adverse Possession; Ejectment.

PRACTICE.

1. **DISMISSAL—DEFAULT IN FILING AMENDED COMPLAINT—DELAY FOR FORTY-EIGHT DAYS—PROMISE OF COUNSEL NOT TO TAKE DEFAULT.** Where a judgment dismissing an action against certain defendants was entered after the plaintiff had been in default for forty-eight days in failing to file a fourth amended complaint, after demurrers had been sustained to the three prior com-

PRACTICE (Continued).

plaints, it cannot be said that the trial court abused its discretion in refusing to vacate the judgment, where it appears that such court believed the defect in the complaint, so far as such defendants were concerned, was incurable, and was on the point of sustaining the last demurrer without leave to amend, and the only showing made to excuse the delay was that counsel for such defendants had verbally promised not to take a default. Such a promise did not mean that plaintiff might go on indefinitely without pleading. (*Lang v. The Lilley & Thurston Company*, 294.)

2. **APPEAL BY NEW METHOD—REVIEW OF EVIDENCE—NEGLIGENCE—FAILURE TO EMBODY EVIDENCE IN BRIEF OR OTHERWISE IDENTIFY IT.** On an appeal taken by the new method by the plaintiff from a judgment of nonsuit in an action to recover damages for the alleged negligence and want of skill of the defendant, as a physician and surgeon, it will be assumed that there was no evidence of such want of care or skill, when counsel for the appellant omits to print in his brief any part of the testimony on that subject, as required by section 953c of the Code of Civil Procedure, or to refer to any part of the record where it is contained, or to argue the question at all. (*Marcucci v. Vowinckel*, 693.)
3. **CONTINUANCE OF TRIAL—ATTENDANCE OF WITNESS—WANT OF DILIGENCE—DISCRETION.**—It was not an abuse of discretion for the trial court to refuse to continue the trial of such case from the afternoon of the last day thereof until the following morning, in order to give the plaintiffs an opportunity to secure the attendance of three additional unnamed witnesses, when there was an entire absence of any showing of diligence made in support of the application for continuance, and no affidavit was made or proposed to be made, and it was not shown that any subpoena had been issued or served on them, or that they had promised to attend then, or at any other time, or that they would, if examined, testify to any material fact, or that they knew anything about the facts of the case, or what counsel expected to prove by them. (*Id.*)
4. **DISCRETION OF TRIAL COURT RESPECTING CONTINUANCES.**—Continuances should not be granted without good cause, and the granting or refusing thereof is usually a matter largely within the discretion of the trial court. An abuse of discretion must be shown to justify a reversal of the judgment because of a ruling on such matters. (*Id.*)

See Appeal; Evidence; Execution; Findings; Instructions; Joinder of Causes of Action; Judgment; Jury and Jurors; Justice's Court; Mandamus; New Trial; Nonsuit; Parties; Place of Trial; Pleading; Receiver; Summons.

PRIORITIES. See Assignment, 1-8; Mechanics' Liens, 5.

PROBATE LAW. See Estates of Deceased Persons.

PROMISSORY NOTE.

1. **BONA FIDE PURCHASER—EVIDENCE—TESTIMONY IN PRIOR ACTION FOR CANCELLATION—JUDGMENT UPHOLDING BONA FIDE PURCHASE.** In an action upon promissory notes by one claiming as a *bona fide* assignee for a valuable consideration before maturity, in which the defense was that the notes had been obtained by fraud to which the plaintiff was a party and of which he was charged with knowledge, the reporter's record of the entire testimony given on the trial of a prior action instituted by the makers of the notes to cancel them on account of the fraud, is inadmissible in support of such defense, where a judgment had been entered in the prior action to the effect that the assignee had acquired the notes for a valuable consideration, before maturity as a purchaser in good faith. (Smith v. Woods, 291.)
2. **POSSESSOR MAY MAINTAIN ACTION ON NOTE.**—In the absence of bad faith, an action upon a note cannot be defended upon the ground that the title is not in the plaintiff, if the plaintiff has possession and the defendant would be protected by the payment of any judgment on the note. (Id.)

See Assignment, 9; Consideration, 2; Deed of Trust, 6, 7; Guaranty; Penalty.

PUBLIC LANDS.

1. **RAILROAD GRANT—INDEMNITY SELECTIONS—RELATION OF PATENT.**—The general rule is that patents to a railroad for indemnity lands relate back to the date of selection of the land within the indemnity limits, with the approval of the land department. (Southern Pacific Railroad Company v. Jackson Oil Company, 392.)
2. **LAND DEPARTMENT—JURISDICTION—FINALITY OF PATENT.**—Pending a proceeding before the United States Land Department for the issuance of a patent to land, the secretary of the interior has jurisdiction to review all rulings theretofore made, but after patent has issued and the government has formally declared that it conveyed the land in question, no further departmental interference is legally possible. (Id.)
3. **IDENTITY OF LAND CONVEYED—FINAL DECISION OF SECRETARY OF INTERIOR—CONFLICTING SURVEYS—MINERAL LOCATIONS.**—The final decision of the secretary of the interior determining that a patent issued to the Southern Pacific Railroad Company for indemnity land, conveyed the land in accordance with the official survey in force at the time the patent was issued, and was dependent upon a supplementary indemnity application which antedated the patent, and was not in accordance with a different survey in effect when the original

PUBLIC LANDS (Continued).

application to select the land was made, is conclusive upon a claimant of land under mineral locations made subsequent to the issuance of the patent. (Id.)

PUBLIC OFFICERS. See Office and Officers.

PUBLIC POLICY. See Estates of Deceased Persons, 13; Will, 42, 43.

QUIETING TITLE. See Deed of Trust; Statute of Limitations, 6.

RAILROADS. See Negligence, 11-15; Public Land; Taxation, 12.

RECEIVER.

1. **FORECLOSURE OF MORTGAGE—INSUFFICIENCY OF PROPERTY TO DISCHARGE MORTGAGE DEBT—VALUE OF PROPERTY MUST BE SHOWN.** In an action to foreclose a mortgage, the appointment of a receiver on the ground that the mortgaged property is probably insufficient to discharge the mortgage debt is not justified, if the only allegation in that connection is a mere averment, on information and belief, that the "property is probably insufficient to discharge the mortgage debt," without any showing of the value of the property, or of any facts indicating its value. (Title Insurance and Trust Company v. California Development Company, 58.)
2. **RIGHT TO RECEIVER IN ACTION TO FORECLOSE MORTGAGE—IMPAIRMENT OF MORTGAGE SECURITY.**—The right of a mortgagee to have a receiver take charge of the mortgaged property *pendente lite* is founded upon the proposition that such action is necessary in order to preserve or protect the interest of the mortgagee. His interest is the lien of his mortgage, and its extent is measured by the amount of the mortgaged debt for which the lien is security. Unless the security for the ultimate payment of the debt is in some way injured or impaired, he cannot be prejudiced. (Id.)
3. **DANGER OF MATERIAL INJURY TO MORTGAGED PROPERTY—EFFECT OF INJURY ON VALUE OF PROPERTY.**—In order to determine whether a receiver should be appointed *pendente lite* in such action, on the ground that the mortgaged property is in danger of being "materially injured," within the meaning of subdivision 2 of section 564 of the Code of Civil Procedure, it is necessary to consider the relative value of the property after the injury has been inflicted, and the amount of the debt, and a receiver should not be appointed, if the injury, though considerable in extent, will still leave enough of the property remaining intact to be ample security for the debt. Consequently, in applying for a receiver on such ground, the plaintiff must show, not only that the property mortgaged was in danger of material injury, but also that such injury would so depreciate

RECEIVER (Continued).

- its value that it would not thereafter afford adequate security for the payment of the mortgaged debt. (Id.)
4. **INJURY TO PART OF MORTGAGED IRRIGATION SYSTEM.**—Where the mortgaged property was of vast extent and consisted of several distinct things, amongst others of an extensive irrigation system, it was an abuse of discretion to appoint a receiver *pendente lite*, upon a mere showing of danger of material injury to a part of such system of irrigation, where no showing was made as to either the extent, the present condition, or the values of the remaining portions of the mortgaged property. (Id.)
5. **EX PARTE APPLICATION FOR RECEIVER—UNDERTAKING BY SURETY COMPANY—APPROVAL BY COURT—EVIDENCE OF AGENT'S AUTHORITY—APPEAL.**—In the absence of any evidence to the contrary, it will be presumed on appeal that persons purporting to act as agents of a surety company in the execution of an undertaking given upon the appointment of a receiver, as required by section 566 of the Code of Civil Procedure, and which was accepted and approved by the court, sufficiently established their authority by evidence presented to the trial court. (Id.)
6. **UNDERTAKING MUST RUN IN FAVOR OF ALL DEFENDANTS.**—The undertaking required to be given by section 566 of the Code of Civil Procedure, if a receiver is appointed upon an *ex parte* application, should run in favor of each defendant in the action, and should be in such form that any defendant would have a right of action thereon if he is damaged by the appointment. If the undertaking given and approved by the court was in favor of only one of the defendants, the appointment of the receiver, so far as the interests of other defendants are concerned, was improperly made. (Id.)
7. **NEW UNDERTAKING FILED SUBSEQUENT TO APPOINTMENT OF RECEIVER—VALIDITY OF APPOINTMENT—RATIFICATION OF ORIGINAL UNDERTAKING.**—Where the original undertaking given ran in favor of only one of the defendants, a new undertaking subsequently given in pursuance of an order of court, running to all the defendants and ratifying and confirming the original undertaking, operated to make valid the appointment of the receiver from the time of its filing, and to cure any defects in the manner of the execution of the original undertaking. (Id.)
8. **REVERSAL OF ORDER APPOINTING RECEIVER—APPEAL BY SINGLE DEFENDANT—EFFECT OF REVERSAL.**—The reversal of an order appointing a receiver in an action to foreclose a mortgage against several defendants, upon the appeal of a single defendant who had neither the possession nor the right of possession of any of the mortgaged property, and whose only interest therein was that of a subsequent encumbrancer or holder of some of the bonds secured by the mortgage, did not affect the validity of the order as to the other parties

RECEIVER (Continued).

to the action. The effect of the reversal would only inure to the defendant appealing, so as to give it the right of participation in the proceeds of any foreclosure sale in preference to the costs and expenses occasioned by the receivership. (Id.)

REFORMATION. See Brokers, 3; Deed, 11-15; Mistake.

RESCISSION.

1. **RESCISSION OF EXCHANGE OF LAND—JUDGMENT FOR RESTORATION OF PROPERTY—APPEAL BY PLAINTIFF FROM OTHER PORTIONS OF JUDGMENT—ACCEPTANCE OF DEED PENDING APPEAL.**—Where a judgment was rendered in an action for the rescission of an exchange of land on the ground of fraud and deceit, directing a restoration to each of the parties of the property formerly owned by him, and also decreeing the payment by the plaintiff to the defendant of a certain sum of money laid out by the defendant upon the land received by him on the exchange, and authorizing the defendant to retain the amount of the income derived by him therefrom, and refusing to allow the plaintiff costs, the plaintiff, by accepting a deed to the property ordered to be restored to him, pending an appeal by him from those portions of the judgment that were against him, did not lose his right to further prosecute the appeal. (Coffman v. Bushard, 663.)
2. **LIABILITY OF DEFENDANT FOR RENTS — REIMBURSEMENT FOR OUTLAYS.**—Where the court found that the plaintiff was defrauded in the exchange, the judgment for the restitution of the property should also require the defendant to account to the plaintiff for the rents of the property received by him on the exchange, after reimbursement for his outlay thereon. (Id.)
3. **ARBITRARY FIXING AMOUNT OF OUTLAY.**—Where the judgment decreed that the plaintiff should pay the defendant the amounts expended by him on account of the property received on the exchange, "provided said amounts are determined by agreement of the said parties or proofs to be presented to this court, within ten days," it was error for the court, in the absence of such agreement or proofs, to arbitrarily fix the amount so expended, and to enter judgment against the plaintiff for such amount. (Id.)
4. **COSTS—PLAINTIFF ENTITLED TO AS MATTER OF RIGHT.**—Notwithstanding such action was in equity, its purpose was the recovery of real property, and it involved the title of real estate. In such action the plaintiff, upon a judgment in his favor, was entitled to his costs as a matter of right, under subdivisions 1 and 5 of section 1022 of the Code of Civil Procedure. (Id.)

See Vendor and Vendee, 13-16, 23.

RESTRAINT OF TRADE.

1. **SALE OF MANUFACTURED PRODUCT—LIMITATION ON MINIMUM SELLING PRICE—PRODUCT SOLD CONSTITUTING ONLY SMALL PART OF MARKET SUPPLY.**—A manufacturer of ground chocolate, whose total output constitutes only a small part of the general market supply of that article, may impose, as a condition of an original sale thereof to a wholesale jobber, a limitation on the minimum price at which the same may be resold at either wholesale or at retail. It is immaterial to the validity of such condition whether or not the product is manufactured in accordance with a secret process, or is protected by trademark, or is covered by letters patent. (*D. Ghirardelli Company v. Hunsicker*, 355.)
2. **RESALE BY ORIGINAL PURCHASER—AGREEMENT OF SECOND PURCHASER TO MAINTAIN PRICES—ENFORCEMENT BY PURCHASER.**—Such a condition is enforceable by the manufacturer, not only as against the original purchasing jobber, but also as against a wholesale purchaser from him, who bought, for the purpose of selling again at retail, under a specific agreement with the jobber, which by its terms was made for the express benefit of the manufacturer, whereby he undertook to maintain the fixed retail selling price. (*Id.*)
3. **CONTRACT MADE FOR BENEFIT OF THIRD PERSON.**—The contract of the second purchaser is one of the class referred to in section 1559 of the Civil Code, providing that “a contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.” (*Id.*)
4. **RESTRAINT OF TRADE.**—Such an agreement is not unenforceable as being in restraint of trade, either under the common law or the act of Congress of July 2, 1890, known as the Sherman Anti-trust Act. (*Id.*)
5. **REASONABLE PROFIT OF BUSINESS — CARTWRIGHT ACT.**—Where it appears that the only object of such agreement was to enable the manufacturer to conduct his business at a reasonable profit, the agreement is not within the prohibitory provision of the so-called Cartwright Act of this state (Stats. 1907, p. 984), as amended in 1909, (Stats. 1909, p. 593). (*Id.*)

SALE.

1. **BILL OF SALE GIVEN AS SECURITY—AGREEMENT TO RESELL—TITLE DOES NOT PASS.**—A bill of sale of personal property executed for the purpose of securing an indebtedness due the apparent purchaser, with an agreement by the latter to resell the property to the apparent seller upon being paid the indebtedness, does not operate as a transfer of the title to the property. (*Fraser v. Sheldon*, 165.)
2. **ACTION FOR POSSESSION OF PERSONAL PROPERTY—FINDING NOT SUSTAINED BY EVIDENCE.**—In an action to recover the possession of

SALE (Continued).

certain personal property, a finding that the plaintiff was the owner and entitled to the exclusive possession of the property involved, under a bill of sale and contracts with its prior owners, is held not to be supported by the evidence. (Id.)

See Agency; Mistake; Restraint of Trade.

SCHOOLS.

1. **UNION HIGH SCHOOL DISTRICT—PROPERTY WITHIN EXEMPT FROM TAXATION FOR COUNTY HIGH SCHOOL—CONSTITUTIONAL LAW.**—The provisions of the Political Code as they existed prior to the amendments of 1909, (Pol. Code, secs. 1670, 1675), exempts the property in a union high school district from taxation for the support of a county high school. Such exemption is not in violation either of subdivision 20 of section 25 of article IV of the constitution, which prohibits local laws exempting property from taxation, or of section 11 of article I, which requires all laws of a general nature to have a uniform operation. (Wood v. County of Calaveras, 398.)
2. **TERRITORIAL LIMIT OF COUNTY HIGH SCHOOL—SAME COUNTY MAY INCLUDE DIFFERENT KINDS OF HIGH SCHOOLS.**—Because a district is called in such sections of the Political Code a “county high school district” furnishes no reason why it should not contain less than the territory of one county. The provisions of the sections, particularly subdivision 20 of section 1670, show that the legislature contemplated the existence of a county high school and other kinds, including union high schools, in the same county at the same time. (Id.)
3. **LEGISLATIVE CONTROL OVER FORMATION OF HIGH SCHOOLS.**—The whole matter of the formation of high school districts is one of legislative control, and the legislature, in such sections, clearly provided for the formation of a union high school within a county where a county high school exists. (Id.)
4. **SPECIAL TAXES FOR SUPPORT OF SCHOOLS—LIMITATION ON PROPERTY LIABLE TO ASSESSMENT.**—Taxes for the support of schools are in their nature special taxes, and the legislature has the power to limit their assessment to the property within the respective districts to be served. (Id.)
5. **ESTOPPEL—FORMER PAYMENT OF INVALID TAX.**—The people within a union high school district are not estopped to deny the validity of a tax on the property therein situated assessed for the support of a county high school, merely because a similar tax had been formerly paid without protest. (Id.)
6. **DE FACTO HIGH SCHOOL DISTRICT—COLLATERAL ATTACK ON EXISTENCE.**—The existence of a *de facto* high school district cannot be collaterally attacked. (Id.)
7. **VALIDATION OF FORMATION OF UNION HIGH SCHOOL DISTRICT.**—Subdivision 11 of the old section 1671 of the Political Code, and section

SCHOOLS (Continued).

1724 of that code, adopted in 1909, had the effect of validating and making unquestionable the legal existence of a union high school district which had been operating as such for one year. Such curative acts are valid. (Id.)

SCHOOL DISTRICT.

1. **SCHOOL DISTRICT—BONDS—KIND OF MONEY IN WHICH BONDS ARE TO BE PAID—ORDER OF BOARD OF SUPERVISORS.**—There being no specific requirement of the law declaring that bonds of a school district shall be made payable in money of a particular form or kind, a resolution of the trustees of the district, calling an election to determine whether the bonds shall be issued, is sufficient, when it provides for bonds payable in lawful money of the United States, and supports a subsequent order of the board of supervisors directing the issuance of the bonds and making them payable in gold coin of the United States. (County of Kings v. Rea, 508.)
2. **ORDER FIXING TIME FOR INTEREST PAYMENT.**—The board of supervisors, after the election authorizing the issuance of such bonds, had power to determine whether the interest thereon should be paid annually or semi-annually, notwithstanding the resolution of the board of trustees and the notice of the election was silent on that subject. (Id.)

See Schools; Taxation, 18.

SHELLEY'S CASE, Rule in. See Deed, 5-10.

SPECIFIC PERFORMANCE.

1. **CONTRACT TO MAKE WILL.**—To warrant the specific enforcement of a contract to make a will in favor of a particular person, the contract must be definite and certain and also just and fair. (Baumann v. Kusian, 582.)
2. **ORPHANS TAKEN FROM CHARITABLE INSTITUTION—PROMISE TO CARE FOR AS CHILDREN—INDEFINITENESS OF CONTRACT.**—A contract entered into by a man and wife, at the time of taking two orphan minors from a charitable institution of which they were inmates, to the effect that they would take such children to their home, and would take good care of them and would rear and educate them in a suitable and proper manner, and would treat them in all respects as their own children, is too indefinite and uncertain to warrant a construction that would impose any obligation on the promisors to bequeath or devise any property to such children, or even to make them their heirs by legally adopting them as their own children. (Id.)
3. **SUBSEQUENT PROMISE TO LEAVE PROPERTY TO CHILDREN—UNCERTAINTY OF CONTRACT—UNFAIRNESS AND INADEQUACY OF CONSIDERATION.**—Promises subsequently made by such man and wife to such

SPECIFIC PERFORMANCE (Continued).

minor children, at various times while the latter were living with them as a part of their family, to the effect that if they continued to remain with them at their home, they should have their property, in consideration of which the children agreed to remain with them for an unspecified and indefinite time, and did so remain until their respective marriages, during all of such time conducting themselves as dutiful children and rendering dutiful services to them, will be refused specific performance as a contract to make a will in favor of such children, both on account of the vagueness and uncertainty of the promises of the children, and also because their promises did not constitute a fair and adequate consideration for the contract. (Id.)

4. **ENFORCEABILITY OF CONTRACT TO MAKE WILL.**—Courts of equity will, under special circumstances, enforce a contract to make a will, or to make a certain testamentary disposition; and this may be done, even when the agreement was parol, where in reliance upon the contract the promisee has changed his condition and relation so that a refusal to complete the agreement would be a fraud upon him. (Id.)

See Statute of Limitations, 11.

STATUTES.

CONSTRUCTION OF WORD "SHALL" — WHEN GIVEN MANDATORY EFFECT.—It is a general rule of construction that the word "shall" when found in a statute is not to be construed to be mandatory, unless the intent of the legislature that it shall be so construed is unequivocally evidenced. This evidence, found in the statute itself, may consist of a declaration that the word is of mandatory import, or of negative words forbidding the doing of the act after the time fixed, or of words withdrawing the power to do the act after the time fixed, or by a showing that a right dependent upon the doing of the act within the time fixed is lost or impaired by the non-performance of that act. (Coke v. City of Los Angeles, 705.)

See Employer and Employee, 3-6; Poisons.

STATUTE OF FRAUDS. See Agency, 4.

STATUTE OF LIMITATIONS.

1. **MORTGAGE — FORECLOSURE — MORTGAGE EXECUTED OUT OF STATE — ABSENCE OF MORTGAGOR FROM STATE.**—Under subdivision 1 of section 339 of the Code of Civil Procedure, the time within which an action can be brought to foreclose a mortgage securing a note, each of which were executed out of the state, is two years from the maturity of the indebtedness. So far as concerns the original mortgagor, under section 351 of that code, the time during which he was absent from the state is not a part of the

STATUTE OF LIMITATIONS (Continued).

time limited for the commencement of the action. (*Foster v. Butler*, 623.)

2. **WAIVER OF STATUTE BY MORTGAGOR—SUBSEQUENT PURCHASERS OR ENCUMBRANCERS NOT AFFECTED.**—A mortgagor cannot, by waiving the bar of the statute of limitations, affect the right of a subsequent purchaser or encumbrancer of the mortgaged premises to insist, as to himself, that the action to foreclose the mortgage was not brought in time. This rule applies not only to cases where the waiver has been by express agreement, but also to cases where the original mortgagor has lost his right to plead the statute by absenting himself from the state. (*Id.*)
3. **PURCHASER AT EXECUTION SALE AGAINST MORTGAGOR—COMMENCEMENT OF RUNNING OF STATUTE.**—Where the mortgaged premises were purchased at an execution sale, after the maturity of the mortgage indebtedness, the statute of limitations commenced to run in favor of the execution purchaser, who was present in the state, and against the right of the mortgagee to foreclose the mortgage as to him, at least as early as the date on which the sheriff's deed to such purchaser was recorded. (*Id.*)
4. **QUIETING TITLE BY EXECUTION PURCHASER—PLAINTIFF NOT A "RESIDENT" OF STATE—STIPULATION.**—In an action by such subsequent purchaser to quiet his title to the mortgaged premises as against the successors in interest of the mortgagee, a stipulation that the plaintiff had never been a "resident" of the state of California, is in no wise inconsistent with the fact of his physical presence there, and does not preclude him from setting up the bar of the statute against the mortgage. (*Id.*)
5. **NONRESIDENTS ENTITLED TO BENEFITS OF STATUTE.**—Section 351 of the Code of Civil Procedure does not deprive nonresidents of the benefits of the statute of limitations. It merely excludes from computation the time during which any defendant, resident or nonresident, may have been out of the state. (*Id.*)
6. **JUDGMENT QUIETING TITLE—PAYMENT OF MORTGAGE INDEBTEDNESS—APPEAL FROM ORDER DENYING NEW TRIAL.**—In such action, the contention that the plaintiff should not have had a judgment quieting his title without paying or offering to pay the mortgage debt, even though an action to foreclose the mortgage be barred, involves a consideration of the claim that the findings do not support the judgment. Such claim might properly be made on an appeal from the judgment, but is not involved and cannot be considered on an appeal from an order denying a new trial. (*Id.*)
7. **PRESUMPTION AS TO FOREIGN LAW.**—In the absence of proof, the law of a foreign jurisdiction with reference to limitations of actions is presumed to be the same as the law of this state. (*Van Buskirk v. Kuhns*, 472.)

STATUTE OF LIMITATIONS (Continued).

8. **PROMISE TO PAY DEBT "WHEN ABLE"—PERFORMANCE OF CONDITION.**—A promise to pay a debt "when able" is conditional, and no cause of action accrues thereon until the condition is performed, that is to say, until the debtor is able to pay, and until then the statute of limitations does not commence to run. (Id.)
9. **COMPLAINT MUST ALLEGE ABILITY TO PAY—APPEAL FROM JUDGMENT.** In an action to enforce such a promise, it is essential to support a judgment for the plaintiff that the complaint should allege, and the court should find, the debtor's ability to pay. A defect in so alleging and finding is reviewable on an appeal from the judgment. (Id.)
10. **DEFENSE OF STATUTE OF LIMITATIONS—DEFENDANT MUST PROVE BAR OF STATUTE.**—In such an action, in order to establish the affirmative defense of the statute of limitations, it was incumbent upon the defendant to show that the debtor had the ability to pay his debt, and that a cause of action accrued against him more than the statutory time before the filing of the complaint. (Id.)
11. **CONTRACT TO CONVEY WATER-RIGHT—PERFORMANCE OF FUTURE LEGAL SERVICES—SPECIFIC PERFORMANCE.**—The statute of limitations does not commence to run against a cause of action to specifically enforce, as against the distributee of the estate of a deceased person, a written agreement of the deceased to convey to an attorney at law an interest in a water-right, in consideration of his services to be performed in appealing a case involving such right to the supreme court, until the final judgment of that court on the appeal, and, under section 337 of the Code of Civil Procedure, the cause of action is not barred until the expiration of four years thereafter. (Archer v. Harvey, 274.)
12. **DECREE DISTRIBUTING WATER-RIGHT—EFFECT OF ON INTEREST ACQUIRED BY CONTRACT.**—A decree distributing such water-right to an heir of the decedent as a part of her estate, did not have the effect to bar the interest acquired by the attorney under such agreement. This result follows, whether the agreement be construed to create in favor of the attorney an equitable interest in the water-right at the time of the decedent's death, or that no interest vested in him until, by performance after her death, he became entitled to conveyance. (Id.)
13. **EFFECT OF DECREE OF DISTRIBUTION—ADVERSE INTERESTS.**—Under section 1666 of the Code of Civil Procedure, a decree distributing the estate of a deceased person to the heirs is not conclusive against one claiming as grantee from such heirs by an instrument executed after the death of the ancestor and before the decree, nor does it bind third parties who claim an interest adverse to that of the testator or intestate. (Id.)

See Appeal, 1; Contract, 5, 6; Deed, 15; Laches; Negligence, 20

STOCK AND STOCKHOLDER. See Contract, 3-8; Corporation.

STREET ASSESSMENT.

1. **STREET OPENING ACT—TIME LIMITED FOR PREPARING ASSESSMENT—PROVISION MERELY DIRECTORY.**—The provisions of sections 16 and 19 of the Street Opening Act of 1903, as amended in 1909 (Stats. 1909, p. 1040), fixing a time limit for the preparation of either the original assessment or a new assessment for the expenses of the proposed improvement, are merely directory. (*Cake v. City of Los Angeles*, 705.)
2. **NEW ASSESSMENT—FAILURE TO PREPARE WITHIN SIXTY DAYS FROM ORDER OF CITY COUNCIL.**—The failure to prepare the new assessment within sixty days from the date of the order of the city council directing it, there having been no extension of time given for that purpose, does not render the assessment void. (*Id.*)
3. **NEW ASSESSMENT MADE ACCORDING TO INSTRUCTIONS OF CITY COUNCIL—INSTRUCTIONS GIVEN AFTER SUSTAINING PROTEST TO ORIGINAL ASSESSMENT.**—The fact that the new assessment was not made in accordance with the free and uninfluenced judgment of the street superintendent, in this case the board of public works of the municipality, but was made solely in accordance with a memorandum of instructions furnished by the city council, does not invalidate the assessment. The fact that such instructions were given by the council after it had sustained the protests to the original assessment and after it had ordered the new, is immaterial. (*Id.*)
4. **EQUITABLENESS OF ASSESSMENT—DETERMINATION OF COUNCIL—ABSENCE OF FRAUD.**—Under that act, a person assessed has the right to be heard by the city council upon the matter of the equitable nature of the assessment, and in the absence of fraud in connection with the assessment, the determination of the council is final. (*Id.*)
5. **PENALTY FOR DELINQUENCY COMPUTED ON ENTIRE ASSESSMENT—DAMAGES AWARDED NOT TO BE DEDUCTED.**—Under sections 21, 22 and 24 of that act, a property owner who had been awarded damages for lands condemned for the proposed improvement, and whose remaining lands were assessed therefor, and who allows the assessment to become delinquent, is liable for a five per cent penalty computed upon the entire amount of the assessment, without deduction for the amount awarded as damages. (*Id.*)
6. **MUNICIPAL CORPORATION—OPENING STREET OVER TIDE LANDS.**—A municipality has power, under the provisions of the Street Opening Act of 1889 (Stats. 1889, p. 70), to open or extend its streets over tide lands. (*West Berkeley Land Company v. City of Berkeley*, 406.)
7. **MEANING OF WORD "LAND."**—The words "land" and "lands" as used in that act, are used in the technical sense meaning "territory," and

STREET ASSESSMENT (Continued).

not in their popular sense as meaning the exposed surface of the earth as distinguished from ground which is alternately covered and uncovered by the tides. (Id.)

8. POSTING NOTICES OVER TIDE LANDS—NOTICES ATTACHED TO FLOATS.

It is a sufficient posting of notices of the passage of the resolution of intention to open a street across tide lands, to attach the same to floats anchored at proper intervals along the line of the proposed work, so constructed that the notices appeared two and a half or three feet above the surface of the water, and in the absence of a contrary showing, it must be presumed that such notices remained in place during the period contemplated by the statute. (Id.)

9. SUFFICIENCY OF NOTICE TO PERSONS NOT OWNERS OF TIDE LANDS.—

Even if such a posting were insufficient as against the owners of the tide lands sought to be condemned, other persons, who were merely landowners within the assessment district affected, could not complain of the insufficiency. (Id.)

10. DESCRIPTION OF EXTERIOR BOUNDARIES OF ASSESSMENT DISTRICT—

REFERENCE TO UNOPENED STREET—DEDICATION AND ACCEPTANCE BY MUNICIPALITY.—In describing in the resolution of intention the exterior boundaries of the district to be assessed for such work, it is a sufficient compliance with the requirements of section 2 of that act, to identify a portion of such boundaries by reference to a certain unopened street, the dedication of which, as the same was delineated upon a particular map on file, had been previously accepted by the municipality, prior to any manifestation by the owner of an intention to revoke the dedication, and before any rights of third persons had intervened. (Id.)

11. DESIGNATION OF TERMINUS OF STREET—LOCATION OF BOUNDARY OF

TIDE LAND—REFERENCE TO MAP IN ANOTHER COUNTY.—A resolution of intention which declares the purpose to open and extend a street "westerly to the westerly boundary line of state tide lands," within the municipality, is not rendered insufficient merely because, for the purpose of exactly locating such boundary, reference must be had to an official map the custody of which was intrusted to an official who was not located in the county in which the municipality was situated. (Id.)

STREETS, ROADS, AND HIGHWAYS. See Mechanics' Liens; Mines and Mining, 13; Street Assessment; Taxation, 17-21; Toll-bridge.

SUMMONS. See Justice's Court, 1.

SUPERIOR COURT. See Justice's Court.

SUPREME COURT. See District Court of Appeal; Habeas Corpus; Office and Officers, 2.

SURETY. See Office and Officers, 11-12.

TAXATION.

1. **DEED TO STATE—ERRONEOUS RECITAL OF NAME OF PERSON ASSESSED—INVALIDITY OF DEED—IDEM SONANS.**—Where the name of the person assessed appeared on the assessment-roll as "E. W. Davis," a recital in the deed to the state that the name of such person was "E. W. Davies," renders the deed void, and it cannot be validated by applying the rule of *idem sonans*. (Henderson v. De Turk, 296.)
2. **NAME APPEARING ON ASSESSMENT-ROLL MUST BE RECITED.**—The provision of section 3785 of the Political Code that the deed to the state based on a sale for delinquent taxes must recite the "name of the person assessed," requires the recital of the name of the person assessed as it appears on the assessment-roll. A failure to observe such requirement renders the deed void, and is not remedied or cured by either section 3807 or 3628 of that code. Neither of those sections purports to apply to the deed made to the state in pursuance of a delinquent tax-sale. (Id.)
3. **TAX DEED AS EVIDENCE OF REGULARITY OF TAX PROCEEDINGS.**—Section 3787 of the Political Code makes such a tax deed evidence of the regularity of such proceedings as are named therein only when it is a deed conforming to the requirements of the law. (Id.)
4. **RULE OF CONSTRUCTION OF TAX DEEDS IS ONE OF PROPERTY.**—It has been uniformly held in this state that a tax deed which misrecites or omits to recite any one of the facts required by the statute to be recited has no effect at all as a conveyance. The theory is that it is competent for the legislature to prescribe the form of instrument which, as the result of a proceeding *in invitum* can alone divest the citizen of his title, and that where the statute prescribes the particular form of the tax deed, the form becomes substance, and must be strictly pursued, and it is not for the courts to inquire whether the required recitals are of material facts or otherwise. This rule has become one of property from which the court should not depart. (Id.)
5. **MUNICIPAL CORPORATIONS—LEVY FOR UNAUTHORIZED PURPOSE—PAYMENT UNDER PROTEST.**—Section 3819 of the Political Code authorizes the recovery of taxes levied by a municipality for an unauthorized purpose, the payment of which was made under protest. (Connelly v. City and County of San Francisco, 101.)
6. **SAN FRANCISCO CHARTER—UNSOLD BONDS NOT OBLIGATIONS OF CITY—TAX CANNOT BE LEVIED FOR PAYMENT OF.**—Under the charter of the city and county of San Francisco only such bonds of the munici-

TAXATION (Continued).

pality as have been sold or whose sale has been contracted for are considered obligations of the city, and only as to such is provision made to meet such obligations by taxation. (Id.)

7. **TAX FOR INTEREST AND REDEMPTION OF UNSOLD BONDS MAY BE RECOVERED.**—Under the provisions of such charter, as well as by general law, the municipality is authorized to levy a tax only for those bonds which have so become an obligation of the city. A tax levied for the payment of the interest on and the redemption of bonds which had not been sold or contracted to be sold at the time of the levy is unlawful, and the recovery of the amount paid thereon under protest may be had under the provisions of section 3804 or section 3819 of the Political Code. (Id.)
8. **INCONVENIENCE TO CITY.**—The fact that the city might be inconvenienced by such a limitation on its taxing powers does not justify a different construction of its charter. (Id.)
9. **TAX LAWS MUST BE STRICTLY CONSTRUED.**—Any attempt on the part of the state, or of one of its subdivisions, to take the property of an individual for public purposes by way of taxation, must find an express statutory warrant, and all laws having this object are to be construed strictly in favor of the individual as against the state. (Id.)
10. **STATE BOARD OF EQUALIZATION—POWER TO MAKE ASSESSMENTS ENDS WITH DELIVERY OF RECORD TO CONTROLLER—MANDAMUS.**—Under the act of April 1, 1911 (Stats. 1911, p. 530), all power of the state board of equalization in the matter of the making of assessments for state purposes and the equalization thereof ends with the final delivery by it of the record of assessments to the state controller, and thereafter a writ of mandate will not lie to compel it to assess the property of a railroad for taxes for the current fiscal year. Such an assessment would be wholly void. (San Diego and Arizona Railway Company v. California State Board of Equalization, 41.)
11. **PRESUMPTION OF DUE PERFORMANCE OF OFFICIAL DUTY—DATE OF DELIVERY OF RECORD OF ASSESSMENTS.**—On an application for such writ, in the absence of a showing to the contrary in the petition, it must be presumed that official duty has been regularly performed, and that the state board of equalization finally delivered its record of assessments to the state controller on the day required by the statute. (Id.)
12. **ASSESSMENT BY STATE BOARD OF EQUALIZATION OF OPERATIVE PROPERTY OF RAILROAD—PROTEST BY CITY ASSESSOR—LIMITATION OF TIME TO MAKE PROTEST—MANDAMUS.**—Under the provisions of the act of 1911 (Stats. 1911, p. 538), any protest by a city assessor against the taxation by the state board of equalization of certain property of a railroad company as operative property must be

TAXATION (Continued).

filed within thirty days after his receipt of the company's report, which that act requires to be served on him. Such requirement is jurisdictional, and a protest filed later has no effect, and does not require the state board to revise or alter its action in placing such property on the assessment-roll as operative property, or to dispose of the protest in any way. Its failure to make any order disposing of a belated protest is not a breach of duty, and *mandamus* will not lie to compel the entry of such order. (*Pacific Electric Railway Company v. Rolkin*, 154.)

13. **DESCRIPTION OF PROPERTY—STATE FRANCHISE OF TELEGRAPH COMPANY.**—An assessment upon property described as the "franchise of the Postal Telegraph-Cable Company in the city of Los Angeles," is to be deemed to refer solely to its state franchise in the streets of that city, and not to its federal nontaxable franchise under the act of Congress of July 24, 1866, and is a sufficient description of the state franchise. (*Postal Telegraph-Cable Company v. City of Los Angeles*, 156.)
14. **FEDERAL FRANCHISE OF TELEGRAPH COMPANY—RIGHT OF OCCUPANCY OF PUBLIC HIGHWAYS—ASSESSABILITY OF STATE FRANCHISE—SITUS OF FRANCHISE.**—The franchise granted by the act of Congress of July 24, 1866, does not give a telegraph company an unencumbered right to occupy the highways of the state by its poles and wires. Such right is subject to charges which may be imposed by the state for such occupancy and use of its public ways; and if the state grants the right to such company to use such part of the highways without compensation, such right is a privilege which is nothing more nor less than a franchise in such highways, having a local *situs* and assessable in each city or county in which such highways are situated. (*Id.*)
15. **OFFER BY STATE IN SECTION 536 OF CIVIL CODE—ACCEPTANCE BY TELEGRAPH COMPANY.**—Section 536 of the Civil Code constitutes a continuing offer by the state to all telegraph companies of the right to use without compensation such portions of the streets of any city as may be necessary or convenient for the operation of their lines, and when such company accepts this offer by placing and maintaining its poles and wires in, along, and over said streets, it thereby acquires from the state a right in the part of the streets so exclusively occupied, which right is a taxable franchise, and distinct and separate from the federal franchise. (*Id.*)
16. **PLEADING—AVERMENT SHOWING ACCEPTANCE OF STATE FRANCHISE—ERRONEOUS LEGAL CONCLUSIONS.**—An averment in a complaint by a telegraph company of the physical fact that it is and has been maintaining and operating its lines of telegraph through and over the public highways of a municipality establishes, as a matter of law and of fact, the proposition that it has accepted and owns

TAXATION (Continued).

the state franchise for that purpose which was offered it by section 536 of the Civil Code. Additional averments that it was so doing solely by virtue of its federal franchise and that it has no franchise from the state, are merely erroneous conclusions of law. (Id.)

17. **ASSESSMENT OF FRANCHISE—USE OF HIGHWAYS BY ELECTRIC LINE—TOLLS NOT COLLECTED ALONG ROUTE.**—The occupancy by an electric light and power company of certain of the public highways of a county by its transmission line, in pursuance of an ordinance of the county granting it a franchise to construct a line along such highways for the purpose of conducting and distributing electrical energy along said route, is assessable as a franchise, notwithstanding the company at the time of the assessment was not using the transmission line erected along that route for the purpose of collecting tolls. (Kern River Company v. County of Los Angeles, 751.)
18. **ASSESSMENT OF FRANCHISE IN DIFFERENT SCHOOL DISTRICTS—VALUATION—ABSENCE OF FRAUD.**—In the absence of any fraud on the part of the assessor in the valuation of such franchise, the assessments of which in each school district purported to be upon the franchise used in that particular district, the fact that he valued the franchise in each district according to the number of miles of transmission lines in that district, without reference to the extent of the public highways over which the lines were erected, does not render the assessments violative of section 10 of article XIII of the constitution, requiring property to be assessed in the district in which it is situated. (Id.)
19. **METHOD OF VALUATION DETERMINABLE BY ASSESSOR.**—In the absence of fraud on the part of the assessor, his method of arriving at the valuation of property is a matter committed entirely to his determination. (Id.)
20. **APPROVAL OF ASSESSMENT BY BOARD OF EQUALIZATION.**—Where such company had appealed to the county board of equalization to correct the alleged inequalities in such assessments, the refusal of the board to reduce the assessments is, in the absence of fraud, conclusive upon the courts. (Id.)
21. **INVALID ASSESSMENT—HIGHWAYS OF DISTRICT NOT USED FOR TRANSMISSION LINE—APPROVAL BY BOARD OF EQUALIZATION.**—Such franchise could not be assessed against the company in a school district in which no part of the public roads was used in the operation of its lines. Such an attempted assessment thereof is without the jurisdiction of the assessor to make, and cannot be validated, or rendered conclusive, by the action of the county board of equalization in approving it. (Id.)

See Corporations, 1-5; Inheritance Tax; Schools.

TELEGRAPH COMPANY. See Taxation, 13-21.

TIDE LANDS.

1. **NAVIGABLE WATERS—FLY'S BAY—FINDING—EVIDENCE.**—The finding that the body of water commonly known as "Fly's Bay," the same being a portion of, and opening into and connected with the Napa River, is navigable water, is held supported by the evidence. (Forestier v. Johnson, 24.)
2. **CONTROL OF NAVIGABLE WATERS—LIMITATIONS ON STATE'S POWER OF DISPOSITION—TITLE SUBJECT TO PUBLIC TRUST.**—So far as may be necessary for the regulation of interstate and foreign commerce, the United States has the paramount right to control the navigable waters within the several states. The state can make no disposition of the soil beneath, or allow any interference with the navigable waters, that will impair this right and power of the United States. The title to the soil beneath such waters, including all that is covered with water at ordinary high tide, as well as that lying below low tide, belongs to the states by virtue of their sovereignty, and is held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing thereon freed from the obstruction or interference of private parties. This trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. (Id.)
3. **SALE OF TIDE LANDS SUBJECT TO PUBLIC EASEMENT IN NAVIGABLE WATERS.**—Sections 3440 to 3493½ inclusive of the Political Code authorizing the sale of swamp lands, salt marsh, and tide lands, conceding that they authorize the sale of the soil covered by water at ordinary high tide, do not authorize a sale which destroys or vacates the dedication of the water to the public uses of navigation and fishery, or which vests in the grantee the right to prevent the public use and convert both land and water to his own private use and possession. Such sections only design to dispose of tide lands subject to the public easements in any navigable waters included within the tracts disposed of. (Id.)
4. **CONSTITUTIONAL LIMITATIONS ON POWER OF STATE TO SELL TIDE LANDS—CONSTRUCTION OF PATENT.**—The provisions of section 2 of article XV of the constitution of 1879, that no person possessing tidal lands of a bay, estuary, or other navigable water, whether

TIDE LANDS (Continued).

the possession be lawful or unlawful, can be permitted to obstruct the free navigation thereof, are mandatory and prohibitory, and operate as a limitation upon the power of the legislature in the matter of the disposition of tide lands, and are to be considered as incorporated in any grant or patent of such lands the same as if inserted therein, and to qualify it so that the estate granted is limited to the permitted uses. The result is that a grantee of such lands may claim the portions of the lands purchased which are not capable of navigation, but that he must leave the navigable waters open for public use. (Id.)

5. **CODE PROVISIONS SIMILAR TO PREVIOUS STATUTES—PRESUMPTION OF SIMILARITY OF PURPOSE AND MEANING.**—It is to be presumed that the legislature intended the provisions of the Political Code respecting the disposition of tide lands, which did not substantially depart from the statutory provisions previously existing, to have substantially the same purpose, object, and meaning. (Id.)
6. **GRANT OF TIDE LAND—NONINCLUSION OF NAVIGABLE WATERS NOT DETERMINED.**—The action of the surveyor-general in receiving the application, approving the survey and preparing the patent for tide lands, or of the governor in executing it, cannot be considered as a determination by the state that the land does not include any navigable water, or as a destruction or discontinuance of the public easement therein, or as an exercise of the functions of the state concerning the control of navigable waters. (Id.)
7. **GRANTEE OF TIDE LANDS CANNOT RECLAIM SO AS TO INTERFERE WITH NAVIGATION—EXISTENCE OF NAVIGABLE WATERS AN OPEN QUESTION OF FACT—DEFENDANT MAY SET UP RIGHTS OF NAVIGATION.**—Conceding that the title to the soil passes when tide land is purchased from the state, under the code, the question whether it includes within its bounds any navigable waters, and the extent of such navigable waters, are not determined by the sale, but remain open for further adjustment between the purchaser and the state, and the sale does not vest in the purchaser the right to erect reclamation works which may materially interfere with the navigation of such waters. And the question whether or not there is such navigable water over such land must in the mean time remain open as a question of fact, and its existence may be shown by any citizen in defense of an action to prevent his exercise of the public right of navigation secured to him by section 2 of article XV of the constitution. (Id.)
8. **POWER OF STATE TO CONTROL NAVIGABLE WATERS—NONEXERCISE OF POWER BY UNITED STATES.**—In the absence of the exercise by the United States of its power to control navigable waters and adjust harbor lines for the purpose of regulating interstate and foreign commerce, the state has control and management of such

TIDE LANDS (Continued).

waters, and its mandates upon the subject are binding upon all persons. (Id.)

9. **ACTIONS BY GRANTEE OF TIDE LANDS—JUDGMENT UPHOLDING DEFENDANT'S RIGHT OF NAVIGATION—TITLE OF SOIL NOT IN ISSUE—IMMATERIAL FINDING—APPEAL.**—In an action by a grantee of tide land to enjoin trespasses thereon, a judgment in favor of the defendants, merely securing to them the exercise of the public rights existing in navigable waters, based upon findings that the land in question is covered by navigable waters and that the defendants are citizens, is not an adjudication against the plaintiff's title to the soil of the property granted, notwithstanding such title was technically put in issue by the pleadings, and the court found thereon adversely to the plaintiff. Such issue and the finding thereon were immaterial, and the finding, although erroneous, is not binding on the plaintiff, and does not warrant a reversal of the judgment. (Id.)
10. **DEFENDANT MAY SET UP RIGHT TO NAVIGABLE WATERS—PRIVATE INJURY NOT ESSENTIAL.**—A person against whom an action is begun to enjoin him from using navigable waters, or other public way, may defend by asserting his public right to do so. He need not, in such a case, show private injury either to person or property. (Id.)
11. **HUNTING WILD GAME AN INCIDENT TO RIGHT OF NAVIGATION.**—The hunting of wild game, although not designated by the authorities as an object for the protection and promotion of which the state holds title to and dominion over the tide lands and navigable waters, nevertheless is a privilege which is incidental to the public right of navigation; and any persons, having the right of navigation over such waters, may exercise that right at will as a public right, and if, in doing so, they find game birds thereon, they may, during the lawful season, shoot and take them. (Id.)

See Street Assessment, 6-11.

TOLL-BRIDGE.

1. **EXPIRATION OF LIFE OF FRANCHISE TO COLLECT TOLLS—BRIDGE BECOMES FREE PUBLIC HIGHWAY.**—Upon the expiration of the twenty-year period limited by the act of March, 1862 (Stats. 1862, p. 76), authorizing the construction of a bridge across the Mokelumne River at Big Bend, situated partly in Calaveras County and partly in Amador County, and granting the right to collect tolls thereon for twenty years, the right to collect tolls ceased by limitation, and the bridge so constructed became a free public highway. This result would have followed even in the absence of any statute to that effect. (Gardella v. County of Amador, 555.)
2. **DEDICATION OF TOLL-ROAD OR BRIDGE TO PUBLIC USE—TERMINATION OF RIGHT TO TAKE TOLLS.**—The construction of a road upon

TOLL-BRIDGE (Continued).

the grant of a franchise to collect tolls is a dedication of the road to public use, subject only to the right to collect tolls. The road belongs to the public, and the only interest of the holder of the franchise is the right to collect tolls as a compensation for building the road, and there is no right to compensation when the right to take tolls has ceased by expiration of the term for which it was granted or by abandonment. The same rules apply to bridges, which are highways under section 2618 of the Political Code. (Id.)

3. **BRIDGES SITUATED IN TWO COUNTIES.**—Section 2619 of the Political Code, providing that “whenever the franchise for any toll-bridge . . . has expired by limitation or nonuser, such bridge . . . becomes a free public highway,” is not limited in its application to bridges or roads wholly within a single county. (Id.)

4. **CERTIORARI—ANNULING ORDERS OF SUPERVISORS DECLARING BRIDGE A PUBLIC BRIDGE.**—A judgment in *certiorari* proceedings annulling, for want of jurisdiction to make it, an order of the board of supervisors declaring such bridge to be a free public bridge, which order had been passed after the expiration of the period limited for the collection of tolls, was not an adjudication that the bridge had not become a free public highway upon the expiration of that period. (Id.)

5. **FRANCHISE TO COLLECT TOLLS ON PUBLIC HIGHWAY—LIMITATION ON POWER OF SUPERVISORS—BRIDGE ACROSS WATERS SEPARATING TWO COUNTIES.**—A board of supervisors has no power to grant a franchise to collect tolls on a bridge constituting a free public highway, except in the case authorized by subdivision 33 of section 4041 of the Political Code, when in their judgment the expense necessary to operate or maintain it as such is too great to justify the county in so operating or maintaining it. That subdivision, however, is limited to the case of bridges situated entirely in a single county, and has no application to the case of bridges across waters separating two counties. (Id.)

6. **CONSTRUCTION OF NEW TOLL-BRIDGE—STATUTORY REQUIREMENTS MUST BE FOLLOWED.**—The board of supervisors of the county situated on the left bank of a river dividing two counties has no power, under section 2843 of the Political Code, to grant the right to construct a new toll-bridge across such river, except upon compliance with the various requirements made necessary by sections 2870 and 2872 of that code. (Id.)

7. **GENERAL POWERS OF SUPERVISORS—CONSTRUCTION OF NEW TOLL-BRIDGE—COLLECTING TOLLS ON EXISTING PUBLIC HIGHWAY.**—The boards of supervisors of the counties bordering upon such river, are not authorized, under their general powers, to enter into a contract for the construction of a new toll-bridge, for with respect to that subject the legislature, by sections 2843 et seq. of the Political Code,

TOLL-BRIDGE (Continued).

has made specific provisions limiting both the extent of the power and the mode of its exercise; nor can the power to grant a franchise to collect tolls upon an existing public and open bridge be implied from any general expression in the code defining their powers, because, in the absence of statute expressly granting it, they have no power to authorize the taking of tolls upon a public highway. (Id.)

8. ESTOPPEL AS AGAINST PUBLIC—INVALID FRANCHISE FOR TOLL-BRIDGE.

The doctrine of estoppel cannot be applied so as to validate, as against the public, grants of franchises to collect tolls upon a bridge constituting a public highway, made by boards of supervisors in excess of the powers conferred upon them. (Id.)

TRUST.

1. TRUST IN LAND—APPLICATION OF RENTS AND PROFITS FOR USE OF MINOR DURING MINORITY—DIRECTION FOR ACCUMULATION OF SURPLUS—TERMINATION OF TRUST—DEVOLUTION OF PROPERTY UPON DEATH OF MINOR.—A deed conveying land in trust, to hold, manage, and control the same, to collect the rents, issues, and profits thereof, to make all necessary repairs, improvements, etc., and "to pay out of the balance of the proceeds of said premises, all sums necessary for the proper education, maintenance, and support of" the minor son of the grantor, "until he shall have arrived at the age of twenty-one years," and giving to the trustee "full power and discretion as to what may be necessary for the proper education, maintenance, and support of the said minor, in so far as the same relates to the trust fund hereby created," with the power to sell the property, reinvest the proceeds, and to do all things necessary or proper in the management of the trust fund, and further providing, that in the event and upon the condition that the said minor should arrive at the age of twenty-one, the trust should terminate and the property conveyed, or the trust fund then in the hands of the trustee should be and become the absolute property of said minor, but in the event he should die before reaching that age, such property, or the trust fund which might exist at the date of his death, should be and become the property of other persons specified, who were not minors, creates a trust solely for the benefit of such minor, terminable upon his arriving at the age of majority or upon his death prior to such time, which is valid under subdivisions 3 and 4 of section 857 and section 724 of the Civil Code. (Hornung v. Sedgwick, 629.)

2. IMPERATIVE DIRECTION TO APPLY RENTS FOR USE OF MINOR—DISCRETION OF TRUSTEE.—The requirement of such deed that the trustee shall apply to the use of said minor so much of the net profits of the property as is necessary for his proper education, mainte-

TRUST (Continued).

nance, and support during his minority, is absolute and imperative, leaving no discretion whatever in the trustee other than one to determine what things are necessary or proper to accomplish the education, maintenance, and support commanded. It will be assumed that the trustee will exercise that discretion fairly and honestly, with a view to provide so far as the net profits will warrant, for such education, maintenance, and support as are reasonable and proper. (Id.)

3. IMPLIED DIRECTION FOR ACCUMULATION OF SURPLUS.—Fairly construed, such deed requires any possible surplus of the net profits to accumulate for the benefit of the minor during his minority, as authorized by subdivision 4 of section 857 of the Civil Code, although no specific direction is given the trustee "to accumulate" them. (Id.)

4. DEVOLUTION OF ACCUMULATIONS UPON DEATH OF MINOR DURING MINORITY.—It is immaterial to the validity of the trust for such minor, that under other provisions of the deed as to the devolution of the property upon the termination of the trust by his death before his majority, such accumulations, if any, will become the property of others who are not minors and who are persons in whose favor a direction to accumulate would not be valid. That result is a mere incident to the exercise by the trustor of the right given by the law to transfer the property subject to the execution of the trust. (Id.)

See Deed of Trust.

UNDUE INFLUENCE. See Will, 7-32.

VENDOR AND VENDEE.

1. OPTION FOR PURCHASE OF MINING PROPERTY—FAILURE TO COMPLY WITH CONDITIONS AS TO PAYMENTS—NONWAIVER OF DEFAULT—FORFEITURE.—Where an option for the purchase of mining property is conditional upon the vendee's making certain payments of the purchase price at stated intervals, and also payments of a certain percentage of the gross amount of any clean-up to be applied to the purchase price, within ten days of the clean-up and expressly provides in regard to such payments that "time is of the essence of this option," and that "upon the failure to make any payments above specified, or upon the breach of any agreement herein provided," all rights of the vendee shall cease and all payments theretofore made shall be forfeited, an inexcusable failure of the vendee to make a payment on account of such clean-up, when the same should be paid according to the agreement, terminates his rights under the option, and makes it impossible for him to enforce the same, in the absence of a waiver on the part of the vendor. (Champion Gold Mining Company v. The Champion Mines, 205.)

VENDOR AND VENDEE (Continued).

2. **VENDEE IN POSSESSION—VENDOR'S RIGHT OF RE-POSSESSION.**—Under such circumstances, it is immaterial that the vendee is in possession under the option. His right to the possession is only such as the contract gives, and if the contract substantially provides that the right of possession shall cease upon the failure to perform a specified condition, the failure to perform such condition entitles the vendor to the immediate possession of the property. No notice by the vendor is essential to terminate the rights of the vendee. His default, unexcused and not waived, *ipso facto* terminates them. (Id.)
3. **SURRENDER OF POSSESSION BY VENDEE—TENDER OF PAYMENTS DUE AFTER DEFAULT—DEMAND FOR POSSESSION.**—Where after such a default of the vendee, the corporate vendor, without having waived the default, by formal resolution of its board of directors, declared the option agreement to be terminated and directed its secretary to immediately take possession of the property, it became incumbent upon the vendee, unless the vendor receded from its determination, to surrender possession on demand therefor. A tender of all the amounts due, made subsequent to such default, could not avail the vendee, even if such tender was made prior to actual service of demand for possession. (Id.)
4. **WAIVER OF DEFAULT—UNACCEPTED PROPOSAL FOR WAIVER.**—After the right of the vendor to retake possession had become fixed by reason of the vendee's default, its unaccepted proposal of certain terms and conditions upon which the default would be waived, including the payment of a larger amount of money than that due under the terms of the contract, and charges that the vendee would not have been required to pay thereunder, did not operate to waive the default. (Id.)
5. **ACTION BY VENDEE TO RECOVER POSSESSION—PLEADINGS—FAILURE TO CONSENT TO VENDOR'S REPOSSESSION.**—An action by the vendee, after the vendor had taken possession of the property on account of such default, brought solely to recover its possession, to obtain an accounting as to its proceeds while in the vendor's possession, and to recover damages caused by the alleged unlawful withholding, is not an action of forcible entry, and the failure of the defendant to deny the allegations of the complaint showing that the plaintiff did not consent to the taking of possession by the defendant is immaterial. (Id.)
6. **RECOVERY OF PURCHASE PRICE—ENCUMBRANCE ON VENDOR'S TITLE.** In such action, the right of the vendee to recover a part payment of the purchase price of the property is not in issue, nor can it avail itself of the fact that the vendor's title to the property was encumbered. (Id.)

VENDOR AND VENDEE (Continued).

7. **VENDEE NOT ENTITLED TO POSSESSION WITHOUT COMPLIANCE WITH CONTRACT.**—Notwithstanding the title of such vendor is defective or encumbered, the vendee is not entitled to remain in possession without complying with the conditions of the contract as to payment. (Id.)
8. **WRITTEN CONTRACT—PROVISION MAKING TIME OF ESSENCE—CANNOT BE VARIED BY PAROL—AGENCY.**—A provision in a written contract for the sale of land making time and punctuality in the payments of the installments of the purchase price of the essence of the contract cannot be varied by evidence of parol statements made antecedent to the execution of the contract, where there was no extrinsic ambiguity to be explained, and no illegality or fraud to be established. Nor can such provision be varied by evidence of subsequent statements of an alleged agent of the vendor, where the contract expressly declared that no agent had authority to alter or change its terms, and no attempt was made to establish any authorization or power in the agent so to do. (Stevinson v. Joy, 279.)
9. **WAIVER OF FORFEITURE—ACCEPTANCE OF PAYMENTS AFTER MATURITY—NOTICE OF INTENTION TO ENFORCE PROVISION FOR FORFEITURE.** Where time is made of the essence of the contract for the payment of rent or other payments of money, and this covenant has been waived by the acceptance of the rent or other moneys after they are due, with knowledge of the facts, such conduct will be regarded as creating such a temporary suspension of the right of forfeiture as could only be restored by giving a definite and specific notice of an intention to enforce it. (Id.)
10. **COVENANT AGAINST ASSIGNMENT—SUBLETTING NOT PROHIBITED.**—A covenant in a contract for the sale of land against assigning will be strictly construed and will not be held to prohibit a subletting. (Id.)
11. **BUILDING ERECTED BY SUBLESSEE NOT AFFIXED TO LAND—AGREEMENT FOR REMOVAL.**—A building erected by a sublessee of the vendee, on the property agreed to be sold in pursuance of an agreement between them that it might be removed at any time the sublessee desired, which building was not permanently affixed to the land, but rested upon boards which were not imbedded in the ground or attached to any material affixed to the land, and which might be removed from the land without disturbing it, did not become a part of the realty. (Id.)
12. **DEFECTIVE TITLE OF VENDOR—VENDEE CANNOT COMPLAIN OF DEFECT PRIOR TO TIME OF PERFORMANCE—GENERAL RULE.**—The general rule obtaining in this state, that a defaulting vendee under an agreement of sale of land cannot complain because at a time prior to the maturity of the contract and the date fixed

VENDOR AND VENDEE (Continued).

thereby for the delivery of a good and sufficient deed, the vendor was not in a position to convey full title to the land, is a harsh one and should not be unduly extended. (*Prentice v. Erskine*, 446.)

13. **TITLE INCURABLY DEFECTIVE—EXISTENCE OF PUBLIC ROAD OVER LAND—DEFAULT OF VENDOR—RESCISSION BY VENDEE.**—A vendor under an executory contract for the sale of land, the title to which at the time of the execution of the contract was incurably defective by any ordinary method of business negotiation, owing to the existence of a perpetual right of way for a public road over the land, is himself in default under the contract, and such default entitles the vendee to rescind the contract at any time, even though the time for final payment of the purchase price has not arrived, and to recover the part payments made under the contract. (*Id.*)
14. **BOTH PARTIES IN DEFAULT—DEMAND AND SURRENDER OF POSSESSION—RESCISSION.**—Where both parties to such a contract were in default, their conduct, the vendor demanding and the vendee surrendering the possession of the premises, amounted to a rescission of the contract. By taking back the possession, the vendor waived his right to insist upon further payments under the contract, and notes of the vendee evidencing payments to be made in the future were properly canceled. (*Id.*)
15. **FALSE REPRESENTATIONS AS TO GOOD TITLE—WANT OF ANY TITLE BY VENDOR—RESCISSION BY VENDEE.**—Where a vendor of land fraudulently induces the vendee to enter into the contract of purchase by representing that he has a good title to the land, when in fact he has none, nor any interest whatever therein, the vendee, upon discovering the falsity of the representation, may sue to rescind the contract and obtain a return of the money paid thereon. (*Crane v. Ferrier Brock Development Company*, 676.)
16. **PLEADING—RESTORATION BY VENDEE.**—It is not essential to the statement of a cause of action for such a rescission for the complaint to aver a restoration to the vendor, where it fails to show that the vendee received anything whatever in performance of the contract. (*Id.*)
17. **POSSESSION BY VENDEE NOT PRESUMED—RIGHT TO POSSESSION.**—There is no presumption of law that the vendee in an executory agreement for the purchase of land has been put into possession. In the absence of anything in the contract from which it can be inferred or implied that he is to have possession, he has no right thereto. (*Id.*)
18. **ABSENCE OF AVERMENT OF RESTORATION OF POSSESSION—MATTER OF DEFENSE.**—The complaint in such action need not aver an offer by the vendee to restore possession, where there is nothing in the contract or in the allegations of the complaint to indicate that he ever had possession, or that the contract gave him the right thereto.

VENDOR AND VENDEE (Continued).

If the vendor relies on the failure to make an offer to restore possession as a defense, it is incumbent upon him to allege and prove that the vendee was in possession at the time he demanded the return of the purchase money or at the time the action was begun. (Id.)

19. **PERFORMANCE BY VENDEE NEED NOT BE AVERRED.**—The rule obtaining in cases where a contract for the sale of land was made in good faith, which requires the vendee, suing to recover the part of the purchase price paid upon discovering that the vendor had subsequently parted with the title, to offer to perform by paying or offering to pay the balance due upon the price, has no application to a suit for the rescission of the contract upon the ground that the vendor, having no title to the land, falsely represented to the vendee that he had the title thereto and thereupon and thereby induced the vendee to purchase. (Id.)
20. **CORPORATE STOCK TAKEN AS EQUIVALENT OF CASH—UNCERTAINTY OF COMPLAINT—RIGHT TO RECOVERY IN MONEY.**—The complaint in the action for rescission, which avers that a part of the purchase price was paid in shares of stock in a corporation which were accepted by the vendor as the equivalent of a specified amount of cash, is not rendered uncertain by the failure to aver the name of the corporation. The fact that such shares were taken as cash, entitled the vendee to a return of the amount of money for which they were received. (Id.)
21. **FAILURE TO PAY INSTALLMENTS WHEN DUE—BELATED TENDER—WAIVER OF DELAY BY VENDOR.**—The rule that a vendee under a contract for the sale of land who has, without excuse, failed to make payments of installments of the purchase price as they fell due, cannot, by a belated tender, put the vendor in default and thus establish a right to recover the sums paid under the contract, does not apply to a case where the vendor has waived the delay in making payments. (Hayt v. Bentel, 680.)
22. **TIME OF ESSENCE—FAILURE TO EXACT FORFEITURE—MATURITY OF ENTIRE CONTRACT PRICE—CONCURRENT CONDITIONS—OFFER OF PERFORMANCE BY VENDOR.**—Where the vendor under a contract making time of the essence, and giving him the option, upon default of the vendee, to declare the whole purchase price due or to cancel the contract, re-enter and take possession of the premises and retain all moneys paid by the vendee as rent for use and occupation, permits the entire contract price to become due, without exercising his option to declare a forfeiture, the payment of the price then becomes a dependent and concurrent condition, nonpayment alone does not put the vendee in default, and the vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture, or maintain a

VENDOR AND VENDEE (Continued).

suit either for the whole price, or for an intermediate installment. (Id.)

23. **LACHES OF VENDEE—DELAY OF VENDEE DOES NOT AFFECT RIGHT TO RESCIND—INABILITY TO GIVE GOOD TITLE.**—Where the provision of such contract making time of the essence has once been waived, mere delay by the vendee, short of the statutory period of limitation, in making a tender, will not constitute laches, in the absence of a showing that the delay has prejudiced the vendor. Such delay would not affect the right of the vendee to rescind the contract for inability on the part of the vendor to make a good title. (Id.)
24. **ACCEPTANCE OF PART OF FINAL PAYMENT AFTER MATURITY.**—The waiver by the vendor of the right to insist upon prompt payment is established by his acceptance of a part of the final installment of the purchase price long after it became due. (Id.)
25. **AGREEMENT TO PAY BALANCE AT TIME OF WAIVER.**—After such a waiver has been made, the fact that the parties agreed, at the time the belated payment was accepted, that the vendee would pay the balance upon the delivery of the deed, is immaterial to the right of the vendee to subsequently rescind for inability of the vendor to give a good title. (Id.)
26. **INTEREST ON INSTALLMENTS NOT ALLOWED.**—An action by the vendee to recover installments of the purchase price paid, on account of the inability of the vendor to give a good title, is in effect an action for money had and received, in which the right is based upon a want or failure of consideration. Until rescission, or a demand for repayment, nothing was due, and interest on such installments from the time of their payment is not recoverable. No different conclusion would follow if the action were construed as one based on fraud. (Id.)
27. **ABSENCE OF SHOWING OF POSSESSION BY VENDEE—FAILURE TO OFFER TO RESTORE POSSESSION.**—In such action, where neither the complaint nor answer averred that the vendee ever received or took possession of the land contracted to be sold, the vendee's notice of rescission was not rendered ineffectual for want of an offer to restore the possession. An averment in the complaint that the parties agreed for possession by the vendee, does not show that possession was in fact delivered. (Id.)
28. **POSSESSION BY VENDEE NOT PRESUMED.**—It will not be presumed in such action, for the purpose of overthrowing a judgment for the vendee, that the possession was in the vendee. (Id.)
29. **PLEADING—RECITALS IN CONTRACT EMBODIED IN COMPLAINT.**—Recitals in a contract incorporated in a complaint will not supply the want of essential averments in the pleading. Consequently, the mere annexing to the complaint of a contract providing that the

VENDOR AND VENDEE (Continued).

purchaser shall have possession cannot be treated as equivalent to an averment that possession was in fact transferred. (Id.)

30. **RESCISSION OF CONTRACT MAY BE HAD IN ACTION.**—Even if the contract had not been formally rescinded by the vendee before the commencement of the action, that relief could be had under a prayer therefor in the complaint. (Id.)

WATER AND WATER-RIGHTS.

1. **APPROPRIATION FOR BENEFICIAL USE—RIGHT ACQUIRED IS PRIVATE—STREAMS UPON PUBLIC DOMAIN.**—Under the law of this state as established at the beginning, and as embodied in the Civil Code of 1872, the water-right which a person gains by diversion from a stream for a beneficial use is a private right, which is subject to ownership and disposition by him as in the case of other private property. The same is true as to the water-rights in streams upon the public domain in California which the act of Congress of July 1, 1866, confirmed or provided for the acquisition of in the future. (Thayer v. California Development Company, 117.)
2. **WATER DEDICATED TO PUBLIC USE—ACQUISITION AND DEDICATION DISTINCT ACTS.**—Even when property is dedicated or appropriated to public use for gain by persons or private corporations, the title and ownership is private and the only interest of the public is that of beneficiaries of the use or trust. The property does not become impressed with a public use or trust until after the owner has first acquired it and then dedicated it to the use. The acts of acquisition and of dedication respectively are distinct from each other, and, technically the latter must follow the former and cannot precede or accompany it. (Id.)
3. **APPROPRIATION NOT A DEDICATION TO PUBLIC USE.**—An “appropriation of water” under the Civil Code is not, *ipso facto*, a dedication or appropriation to public use. The additional act of dedication is as necessary to the creation of a public use in a water-right so acquired as it would be if the right was acquired by conveyance or in any other manner, or as in the case of any other property dedicated to public use. (Id.)
4. **ESSENTIAL FEATURES OF PUBLIC USE—USE OPEN TO INDEFINITE PUBLIC.**—The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character. (Id.)
5. **USE OF WATER IN MUNICIPALITIES—WATER FOR IRRIGATION WHEN NOT A PUBLIC USE—USE LIMITED TO PARTICULAR CLASS.**—In the case of a public use of water in villages, towns, and cities, the right to the use usually extends to every inhabitant within the range of the distributing system or who can get access thereto. In the case of

WATER AND WATER-RIGHTS (Continued).

water for irrigation, the class is necessarily more select, and does not include the general public within the area served. This is so because only those occupying land can make use of the water. For this reason, while there may be a public use for the benefit of landowners, the use of water for irrigation is not public unless the water is available, as of right, upon equal terms, to all landowners of the class and within the area to be benefited who can get water from the ditches to their lands. If the dispenser of water has the right to say who shall have it, and upon what terms, selling to one and refusing to sell to another at will, it is not devoted to public use. (Id.)

6. **USE OF WATER LIMITED TO LANDOWNERS WHO ARE STOCKHOLDERS IN CORPORATION RECEIVING IT.**—A water company, whose method for the disposition of the water appropriated by it for the use of itself and others for the purpose of developing power and for the irrigation of land in a specified territory, and whose conduct in distributing the same, have been wholly inconsistent with the idea that the water was held out for general sale or distribution, and were consistent only with the theory that the intention was to retain control of the water to the extent, at least, of choosing for itself the persons and corporations to whom it should be sold or delivered, and the terms and conditions on which such sales or deliveries should be made, and whose uniform practice had been to furnish water to certain subsidiary corporations organized by it for the irrigation of such lands situated within specified districts as should belong to their stockholders, and to no other persons, on certain prescribed conditions for the apportionment of the water between such stockholders, and for the payment therefor, did not devote its water to public use. (Id.)
7. **CHARACTER OF RECIPIENT CORPORATIONS.**—The effect of such a sale and distribution is the same whether the corporations to whom the water was furnished were merely subsidiary to and agents of the distributing company or were or should become independent companies, and merely purchasers of the water so sold and distributed. (Id.)
8. **PUBLIC USE CARRIED ON IN FOREIGN COUNTRY—SERVICE IN CALIFORNIA NOT AFFECTED.**—The fact that such distributing company was carrying on a public use in a foreign country, and had received from that country a grant of the power of eminent domain, would not affect the character of the service of the corporations doing business in California to whom it distributed water, and the fact that it derived all of its water from the same source is immaterial: A part of a stream, or a part of a single appropriation, may be devoted to public use and another part entirely to private use. (Id.)

WATER AND WATER-RIGHTS (Continued).

9. **CONSTRUCTION OF CONSTITUTIONAL PROVISION AS TO PUBLIC USE OF WATER.**—Section 1 of article XIV of the constitution, providing that “the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law,” does not create a public use whenever any water is sold or distributed, regardless of the number of persons to whom it is delivered, the manner or character of the disposition made of it, or of the transfer of the right thereto. (Id.)
10. **MEANING OF TERM “APPROPRIATED” WATER.**—The word “appropriated,” as used in that section, does not refer to the act by which the water is acquired, as for example, the taking from the stream, but to the act or acts by which it is designated, set apart, and devoted to the purposes of sale, rental, or distribution. Such section must be understood to apply, as it has previously always been construed to apply, to cases where one has appropriated water generally, for sale, rental, or distribution, and not to cases where sales are made to particular persons at a fixed price by ordinary contracts of purchase and sale. (Id.)
11. **RIGHTS TO WASTE WATER NOT USED BY APPROPRIATOR.**—The fact that such distributing company conducts more water through its canals than is used, and that there is always some waste water discharged from its distributing system, did not impose upon it the obligation of furnishing such excess to a person who did not belong to the class to whom its disposition of water was limited. So much of the water as may be unavoidably wasted is to be deemed a part of that which is appropriated to the beneficial use and which the company has the right to take. So far as any other waste water is concerned, it is water to which the company has acquired no right by its appropriation, because not applied to a beneficial use, and is subject to appropriation by others. (Id.)
12. **CONSTRUCTION OF CONTRACTS — WATER DELIVERED TO IRRIGATION COMPANY FOR CARRIAGE.**—In an action brought to have it determined that the plaintiffs are entitled to be furnished by defendant with water for irrigating purposes upon certain lands, it is held, upon a construction of the evidence, including certain contracts upon which the plaintiffs based their rights, that the defendant was under no obligation to deliver to the plaintiffs, as members of a class designated in such contracts as “old users” of a portion of the water carried in its ditches, any water except such water as might be received by it from them to be carried in its ditches for distribution to them, and that it was not required to furnish to either of the plaintiffs any of its own water acquired for its stockholders and for sale if there was a surplus over the amount

WATER AND WATER-RIGHTS (Continued).

required for the stockholders. (Gordon v. Covina Irrigating Company, 88.)

13. **PARTIES IN ACTION TO DETERMINE RIGHTS TO WATER AS BETWEEN MEMBERS OF A PARTICULAR CLASS.**—Whether the plaintiffs had acquired any right, as against other members of the class of old users, to be furnished with a greater portion of the old users' water than they actually delivered to the defendant for carriage in its ditches, could only be determined in an action in which such other old users were joined as parties. (Id.)
14. **RIGHT OF WAY FOR WATER DITCH—EASEMENT IN GROSS—COVENANT FOR THE RIGHT TO USE WATER.**—In view of all the circumstances appearing in this case it is held that a provision in a deed of a right of way over the lands of the grantor, for use as a water ditch, that the grantor should "have the right to purchase and use the water of said ditch upon the same terms and conditions as the stockholders" of the grantee, created a right that was merely personal to the grantor, and not an appurtenance to any particular land, and that the right did not pass by a transfer of the land over which the ditch was constructed. (Id.)

See Eminent Domain; Statute of Limitations, 11-13; Tide Lands.

WEIGHTS AND MEASURES. See Office and Officers, 3-10.

WILL.

1. **ESTATE OF DECEDENT CANNOT TAKE UNDER WILL.**—The estate of a deceased person is not a person or entity which can take under a will. (Estate of Glass, 765.)
2. **BEQUEST TO ESTATE OF PERSON NAMED—CONSTRUCTION.**—A bequest of the residue of the property of the testatrix to "father Glass's estate," the person whose estate was indicated being alive at the date of the will but having predeceased the testatrix, cannot be construed as a bequest to such person if alive, and if not, to his legal heirs, or his devisees or legatees as the case may be. (Id.)
3. **CONTEST BEFORE PROBATE—TIME FOR FILING WRITTEN OPPOSITION.**—In the case of a contest of a will before probate, the Code of Civil Procedure nowhere in terms prescribes when the written opposition must be filed, in order to entitle it to be considered. Obviously, to be effectual as a contest before probate, it must be filed before the alleged will is admitted to probate, and the statute contemplates that it will be filed at or before the time designated in the notice for the hearing of the petition for probate. But the person proposing to contest before probate does not forfeit his right to do so merely by reason of failing to file his opposition at or prior

WILL (Continued).

to the time so designated in the notice for the hearing. (Estate of Mollenkopf, 576.)

4. **OPPOSITION FILED BEFORE TIME OF CONTINUANCE OF HEARING.**—A written opposition to the probate, which was properly served on the attorney for the petitioner, and filed before the time to which the hearing of the petition for probate had been continued, is in time and must be considered, and is a bar to the admission of the will to probate, until disposed of in the manner provided by law. (Id.)
5. **TAKING PRELIMINARY TESTIMONY AT DATE OF HEARING—CONVENIENCE OF WITNESS—TESTIMONY TAKEN WITHOUT PREJUDICE TO CONTESTANT.**—Where the written opposition is so served and filed, the mere fact that the court, at the time designated in the notice for the hearing of the petition for probate, received testimony in support of the will sufficient to make a *prima facie* case for its admission, does not defeat the right to maintain such contest, if the court, at the time of taking such testimony, expressly declared that he did so preliminarily and merely for the convenience of witnesses and without prejudice to the rights of the contestant. (Id.)
6. **REFUSAL TO ENTERTAIN CONTEST—CONTESTANT PREJUDICED.**—The refusal of the court to entertain a properly instituted contest of a will before its probate must be deemed prejudicial to the contestant, notwithstanding the law gives the contestant the right to institute a new contest at any time within one year after the alleged will is admitted to probate. (Id.)
7. **MENTAL INCOMPETENCY — UNDUE INFLUENCE — EVIDENCE — CONDUCT AND STATEMENTS OF TESTATOR SHORTLY AFTER EXECUTING WILL.**—On a contest of a will on the ground of the mental incompetency of the testator and the undue influence of his wife, evidence that about ten or fifteen minutes after the will had been fully executed, the testator returned to the office of the person who had drafted it in an apparently nervous condition and in a state of physical collapse, and of statements then made by him to the effect that matters would have been extremely uncomfortable at his home if the will had not been properly executed, was competent solely upon the issue as to the testator's mental condition, and was incompetent to prove the undue influence, and an instruction so limiting its effect was properly given. (Estate of Gleason, 756.)
8. **CONDUCT AND STATEMENTS NOT PART OF RES GESTAE.**—The conduct and utterances of the testator on such occasion were not part of the *res gestae* of the execution of the will, so as to render evidence thereof competent on the issue of undue influence, and the mere fact that but a trifling period of time elapsed between the testamentary act and this occurrence, does not render the evidence admissible for such purpose. (Id.)

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9. **RES GESTAE DEFINED.**—The *res gestae* are those circumstances which are the undesigned incidents of particular litigated acts, and are admissible where illustrative of such acts. These incidents may be separated from the act by lapse of time more or less appreciable. Their sole distinguishing feature is that they should be necessary incidents of the litigated act in the sense that they are part of the immediate preparations for, or emanations from, such acts, and are not produced by the calculated policy of the actors. They must stand in immediate causal relation to the act, a relation not broken by individual wariness seeking to manufacture evidence for itself. Declarations which are the immediate accompaniments of an act, their immediateness being tested by closeness, not of time but by causal relation, are admissible as part of the *res gestae*. (Id.)
10. **FACTS CONSTITUTING UNDUE INFLUENCE—EVIDENCE OF—DECLARATIONS OF TESTATOR.**—In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such undue influence has been exercised, but also that it has produced an effect upon the mind of the testator, by which the will is not the expression of his own desires. The external facts constituting the exercise of undue influence must be established by other evidence than the declarations of the testator. His declarations are incompetent to show either that the influence was exercised, or that it affected his actions, and are inadmissible, except as they may illustrate his mental state, and give a picture of the condition of his mind contemporaneous with the declarations themselves. (Id.)
11. **IMMATERIAL ERROR—INSUFFICIENCY OF EVIDENCE OF UNDUE INFLUENCE.**—Even if such subsequent conduct and statements of the testator were properly part of the *res gestae* of the execution of the will, the error of the trial court in refusing to admit the evidence thereof on the issue of undue influence was immaterial, when the other evidence in the case fell far short of establishing that the will was the result of undue influence exerted upon the testator by his wife in such manner as improperly to influence him in the making of the will. In the present case, such other evidence is held insufficient to show that the will was the result of the wife's undue influence. (Id.)
12. **UNDUE INFLUENCE MUST OPERATE AT TIME WILL WAS MADE.**—A duly executed will cannot be set aside on the ground of undue influence, unless there be proof of a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made. (Id.)
13. **REVOCATION OF PROBATE—MENTAL INCOMPETENCY—UNDUE INFLUENCE—FRAUD—NONSUIT—EVIDENCE.**—In a proceeding to revoke the probate of a will on the grounds of undue influence and fraud, and for the alleged mental incompetency of the testator, in which a motion for nonsuit was granted at the close of the contestant's

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case, it is held, that the evidence was insufficient to establish either of such grounds of contest, or to warrant the submission of the question to the jury. (Estate of Packer, 525.)

14. **ELEMENTS NECESSARY TO UNDUE INFLUENCE.**—Nothing less than pressure so acting on a testator as to destroy his free agency is sufficient to constitute undue influence. (Id.)
15. **PRESUMPTION OF UNDUE INFLUENCE—PROVISION FOR PERSON OCCUPYING FIDUCIARY RELATION.**—No presumption that a testator was unduly influenced arises from the mere fact that the will makes provision for one occupying a fiduciary relation to him. There must, in addition, be at least a showing that the person so benefited had some part in the making of the will. (Id.)
16. **HOSTILITY TO CONTESTANTS.**—Conceding that the contestants were entitled to show that the persons charged with exercising undue influence entertained feelings of hostility toward them, such evidence could not have availed to make a case sufficient to go to the jury in the absence of anything tending to prove that undue influence had in fact been exercised. (Id.)
17. **MENTAL INCOMPETENCY—TESTATOR OF ADVANCED YEARS—FAILING EYESIGHT.**—The fact that a testator was of advanced years and that his eyesight was failing, is not sufficient evidence of mental incompetency to justify setting aside his will. (Id.)
18. **UNNATURAL OR UNJUST WILL.**—A jury is not authorized to overturn a will merely because its dispositions do not conform to the jurors' notions of justice or propriety. The will in question is held to be neither unnatural nor unjust. (Id.)
19. **FAILING MEMORY OF TESTATOR.**—Evidence that a testator's memory was somewhat weakened, without any showing of impairment of his ability to grasp salient facts in relation to his property, its situation, and the objects of his bounty is not sufficient proof of want of testamentary capacity. (Id.)
20. **EVIDENCE—LETTERS USED BY WITNESS TO REFRESH MEMORY—PARTY CALLING WITNESS CANNOT INTRODUCE IN EVIDENCE.**—Under section 2047 of the Code of Civil Procedure, a party calling a witness has no right to treat as evidence, by reading, or showing, or handing to the jury, letters written by the witness, and used to refresh the witness' recollection. (Id.)
21. **ERROR CURED BY SUBSEQUENT TESTIMONY.**—Any error in refusing to permit a witness for the contestants to answer the question whether she had ever heard the wife of the testator say anything to her husband about doing anything for one of the contestants, is rendered harmless, if the witness subsequently testifies that she never heard any such conversation. (Id.)

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22. **REVOCATION OF PROBATE — FRAUD — DEFECTIVE EXECUTION — EVIDENCE.**—In a proceeding to revoke the probate of a will, it is held that the trial court was justified in holding that there was no substantial evidence of fraud or of any defective execution of the will. (Estate of Purcell, 300.)
23. **UNDUE INFLUENCE — OPPORTUNITY TO EXERCISE — INVALIDATING WILL.**—In order to invalidate a will on the ground of undue influence, mere evidence that the persons alleged to have exercised such influence had the opportunity to do so and might have done so if they had been so disposed and had possessed such influence, is insufficient. The undue influence must actually exist, it must be actually exerted and it must be so exerted as to affect the terms of the will. (Id.)
24. **CONFIDENTIAL RELATIONS WITH TESTATRIX—PRINCIPAL AND AGENT —BURDEN OF PROOF.**—The fact that the confidential relation of principal and agent existed between the testatrix and an executor and beneficiary under her will, does not of itself prove that the will was procured by undue influence arising from that relation, nor cast upon him the burden of proving the absence of such influence at the time of its execution. (Id.)
25. **EVIDENCE—ATTORNEY WHO DREW WILL—CROSS-EXAMINATION TO REBUT INFERENCE OF UNDUE INFLUENCE.**—Where in support of the issue of undue influence, the contestants, on the direct examination of the attorney who drew the will, elicited evidence tending to create an inference that a person charged with the exercise of undue influence was unduly active in the matter of the execution of the will and was endeavoring to influence the testatrix in his favor, it was proper for the proponents, on cross-examination of the attorney, to show what actually occurred during his consultation with the testatrix at her house in reference to the terms of the will and at a subsequent interview between them at his office at the time the will was executed, where such facts would tend to rebut such inference. (Id.)
26. **MENTAL CAPACITY—IMPAIRMENT OF MEMORY DUE TO AGE.**—A testatrix having a slight impairment of memory due to old age which led her to rely on others more than she otherwise would, but who was nevertheless able to and always did think, talk, and act rationally, and manage such of her affairs as she there had in hand with reasonable prudence and judgment, was not mentally incompetent to make a will. (Id.)
27. **MEDICAL TESTIMONY—OPINION BASED ON ERRONEOUS ASSUMPTION OF FACTS.**—An opinion of a medical expert as to the mental incompetency of the testatrix, based upon a hypothetical question which assumed facts in respect to her mental condition entirely variant from those shown by the uncontradicted evidence, and upon a mis-

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conception of the effect of the evidence, cannot be given any probative force. (Id.)

28. **WANT OF TESTAMENTARY CAPACITY — EVIDENCE — NONSUIT PROPERLY GRANTED.**—On a contest of a will on the ground of the want of testamentary capacity by the testatrix at the time of its execution, it is held, upon a review of the evidence on that issue, that the trial court was warranted in granting a nonsuit, and that on the whole case no reasonable person could believe that the testatrix had not sufficient mental capacity to make the will. (Id.)
29. **ADMISSION OF ONE OF SEVERAL LEGATEES—INCOMPETENT EVIDENCE.** On a contest of a will on the ground of undue influence, evidence of a statement made by one of several legatees, which was in effect an admission tending in some degree to prove undue influence, is incompetent. (Id.)
30. **IMPEACHMENT OF PARTY'S OWN WITNESS — PRELIMINARY SHOWING.**—On the trial of such a contest, the contestants cannot impeach their own witness by evidence of contradictory statements, unless they first show that they had been misled or surprised by the testimony he gave. (Id.)
31. **PROPOSERS' BILL OF COSTS—TIME OF FILING—JUDGMENT.**—A ruling of the trial court granting a motion for a nonsuit on the contest of a will is not the judgment of the court, and the proponents' cost-bill is filed within the time allowed by section 1033 of the Code of Civil Procedure, if it be filed within five days after the judge signed the draft of the form of the judgment which was afterward entered in the minute-book. (Id.)
32. **FINDINGS NOT REQUIRED—DECISION.**—No findings are necessary to such a judgment, and hence the "decision" referred to in section 1033 of the Code of Civil Procedure must be understood in such cases, to mean a judgment entered upon a motion. (Id.)
33. **CONSTRUCTION OF LATENT AMBIGUITY—MISNOMER OF BENEFICIARY —EXTRINSIC EVIDENCE TO REMOVE AMBIGUITY.**—The testatrix, a native of Ireland, and who had come to San Francisco about fifty-five years before her death there, by her will devised one-fourth of the residue of her estate "to my niece Mary, a resident of New York, said Mary being the daughter of my deceased sister Mary, the name of my niece Mary I do not know as I understand she is now married, nor am I sure of niece Mary's maiden name, as her mother, my sister Mary, was twice married, but I believe my niece's maiden name was Mary Donohoe." At the time the testatrix left Ireland she had a sister Mary, who remained there. This sister, by her first marriage, had two daughters, Annie and Mary. After the death of her first husband she married a man named Donohoe. The daughter Mary married a man by the name

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of Smith, and continued to reside in Ireland, and had never been in the United States. The other daughter, Annie, married a man by the name of Sheridan, came to the United States about twenty-five years ago, and at the date of the will lived and still lives in Brooklyn, New York. The testatrix left Ireland before either of the daughters of her sister Mary was born, never saw either of them, and, being unable to write, never personally wrote to either of them. *Held*, that the will disclosed a latent ambiguity and uncertainty as to the person whom the testatrix intended to indicate by such provision, to explain which extrinsic evidence was admissible, and that such evidence showed that the person intended to be designated as beneficiary was the testatrix's niece Annie, who was a resident of New York. (Estate of Donnellan, 14.)

34. **APPLICATION OF FACTS TO LANGUAGE OF WILL—CONSTRUCTION A QUESTION OF LAW.**—Wherever doubt arises as to the meaning of a will, such doubt is resolved by construction, and that construction is one of law—it is an application of legal rules governing construction either to the will alone or to properly admitted facts to explain what the testator meant by the doubtful language. In those cases where extrinsic evidence is permissible, there may be a conflict in the evidence itself, in which case the determination of the conflict results in a pure finding of fact. The facts thus found are still to be applied to the written directions of the will for the latter's construction, and that construction still remains a construction of law. (Id.)
35. **CONFLICT IN EXTRINSIC EVIDENCE—CONSTRUCTION OF WILL IN PROBATE COURT SUBJECT TO REVIEW ON APPEAL.**—In such cases, where the evidence of the facts is in conflict, the findings of facts by the jury or trial court will not be disturbed on appeal. But the application to the will itself of the facts found, admitted or established without conflict, presents a question of legal construction, which is purely a question of law, and the construction of the court in probate is subject to review on appeal to determine whether or not a wrong construction at law has been reached. (Id.)
36. **LIMITED PURPOSE OF EXTRINSIC EVIDENCE.**—In all cases where extrinsic evidence is admissible to aid in expounding the will, the evidence is limited to the single purpose of explaining and interpreting the language of the will, and is never permitted to show a different intent or a different object from that disclosed (though perhaps obscurely) by the language of the will itself. (Id.)
37. **CLASSES OF WILLS PRESENTING LATENT AMBIGUITIES.**—Broadly speaking, there are two classes of wills presenting latent ambiguities, for the removal of which resort to extrinsic evidence is permissible. The one class is where there are two or more persons

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or things exactly measuring up to the description and conditions of the will, the other class is where no person or thing exactly answers the declarations and descriptions of the will, but where two or more persons or things in part, though imperfectly, do so answer. The will in question belongs to this latter class. (Id.)

38. **PREFERENCE NOT GIVEN TO NAME OVER DESCRIPTION.**—In resolving such latent ambiguity there is no rule of construction which prefers a name to a description. (Id.)
39. **EVIDENCE—HEARSAY—CONTENTS OF LETTERS.**—The testimony of a witness as to the contents of a letter, without proof either of the destruction of the letter or that the witness had ever read it, is inadmissible hearsay; so, also, is the declaration of a witness as to the contents of letters, whose destruction was not proved, which the witness had never read, and the contents of which he was testifying to upon statements of those contents made to him by another. (Id.)
40. **DEVISE—REMAINDER TO HEIRS OF TESTATOR'S FAMILY.**—Where a testator named Womersley, whose sole heirs at law were his widow and his surviving brothers and sisters, devises all his real estate to his wife for the period of her natural life, and directs that at her death the property shall be equally divided "among the heirs of the Womersley family," the remainder so devised goes to his brothers and sisters who would be his heirs in the event that he died intestate, to the exclusion of the widow of a deceased brother. (Estate of Womersley, 85.)
41. **LATENT AMBIGUITY — CONSTRUCTION — UNCERTAINTY.**—Such devise in remainder involves no latent ambiguity, and any uncertainty therein arises upon the face of the will, and is to be construed by taking in view the circumstances under which the will was made, excluding the testator's oral declarations. The uncertainty in such devise is not so great as to avoid it. (Id.)
42. **CONTRACT BETWEEN SOLE HEIR AND EXECUTORS TO DEFEAT PROBATE—ILLEGAL CONSIDERATION—PUBLIC POLICY.**—A contract between the executors named in a will and the sole heir of the testator, by which the executors agreed, in consideration of the promise of the heir to bequeath to each of them by her last will a portion of her estate, to actually join with such heir in having the will set aside, regardless of its validity and in violation of the rights of other legatees who received benefits thereunder, to use the office to which they were appointed by the will to accomplish this result, and as executors named in the will to institute a proceeding for its probate and the issuance of letters testamentary to themselves for the sole purpose of enabling the heir to contest the same and to allow such contest to prevail by default on their part, regardless of the merits thereof, is not a mere agreement for the relinquishment of

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a valid right, or a matter which concerns the parties only, but is a contract opposed to public policy, and is based upon an illegal consideration. (*Gugolz v. Gehrken*, 596.)

43. **PARTIES IN PARI DELICTO—AUNT AND NEPHEW.**—In the absence of any evidence tending to show the exercise of undue influence by such heir over one of the executors, or that he was ignorant of the law, the mere fact that such heir was his aunt and was in *loco parentis* to him, and that he had barely attained his majority at the time the will was denied probate, does not prevent them from being in *pari delicto* in respect to such contract. (*Id.*)

See Consideration, 2; Estates of Deceased Persons, 5-7, 22-25;
Specific Performance.

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